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FEDERAL COMMUNICATIONS COMMISSION

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FCC 74-307

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
ALPINE BROADCASTING CO., PETOSKEY, MICH.
For Construction Permit for New FM Translator Station
File No. BPFT-111

MEMORANDUM OPINION AND ORDER

(Adopted March 28, 1974; Released April 5, 1974)

BY THE COMMISSION:

1. The Commission has before it for consideration the above-captioned application of Alpine Broadcasting Company, licensee of station WWRM-FM, channel 294 (106.7 MHz), Gaylord, Michigan, requesting a construction permit for a new one-watt FM broadcast translator station to serve Petoskey, Michigan, by rebroadcasting station WWRM-FM on output channel 265 (100.9 MHz). Also before the Commission is a petition to deny, filed pursuant to section 309(d) of Communications Act of 1934, as amended, by Harrington Broadcasting Company, licensee of station WJML-FM, channel 255 (98.9 MHz), Petoskey, Michigan, and various pleadings filed in connection therewith.[1]

2. Petitioner claims standing as a party in interest within the meaning of section 309(d) of the Communications Act of 1934, as amended, on the grounds that station WJML-FM would compete in Petoskey for audience with the proposed new translator station and diversion of audience from station WJML-FM would cause petitioner economic injury. We find that petitioner has standing. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 60 S. Ct. 693, 9 RR 2008.

3. Petitioner raises numerous questions with respect to the application. Initially, petitioner contends that, because Petoskey is within 250 miles of the Canadian border, the translator must meet the requirements of the Canadian-U.S. Agreement on FM broadcast stations. FM translators are not required to comply with the provisions of the Agreement relating to FM stations. In the *Report and Order* in Docket No. 17159, FCC 70-1042, 20 RR 2d 1538, promulgating the new FM translator service, we stated, in paragraph 8:

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[1] The Commission has before it for consideration the following pleadings: Corrective Supplement to Petition to Deny, filed August 27, 1973, by Harrington; Opposition to petition to deny, filed September 7, 1973, by Alpine; Reply to opposition, filed September 19, 1973, by Harrington; Supplement to reply, filed September 20, 1973, by Harrington; Request for authority to submit additional pleading, filed October 10, 1973, by Alpine; Supplement to petition to deny, filed October 10, 1973, by Harrington; and Opposition to request for authority to file additional pleading, filed October 18, 1973, by Harrington; Further comments (on amended application), filed February 12, 1974, by Harrington.

> FM translators proposed within 20 miles of the Canadian border are subject to coordination with the Canadian government.

This was based upon an exchange of correspondence with the Canadian Government in which the Canadian Government concurred in the United States proposal that only proposals for FM translators within 20 miles of the common border need be referred to Canada. We hold, therefore, that this contention is without merit.

4. Petitioner next challenges the need for the translator, asserting that Petoskey is within the predicted 3.16 mV/m contour of station WWRM–FM and the applicant has not shown, in its application, that there is a need for the translator. The Commission has repeatedly held that the need for a translator is presumed; an applicant need not establish need unless an opposing party first makes a *prima facie* case of lack of need, whereupon the burden of showing need is upon the applicant. E.g. *Roger D. Olsen*, FCC 73–905, 28 RR 2d 493, released September 14, 1973. Petitioner has not established a lack of need in this case. The applicant alleges that terrain features preclude delivery of satisfactory signals to parts of Petoskey and has supported this allegation with a profile graph. Petitioner's efforts to establish lack of need consist of listening to WWRM–FM "on various occasions" and reports from members of WJML–FM's staff, subsequently supplemented by field strength measurements made with an uncalibrated meter, the results of which were not submitted. Later, petitioner's chief engineer made a 75-minute drive through Petoskey and "listened." Surely the Commission is entitled to expect more than this as a basis for concluding that a *prima facie* showing has been made that there is no need for a translator. We do not require proof, but we do think that much more is required than has been provided. We hold that petitioner has failed to overcome the presumption of need for the translator. Petitioner has also raised other questions which we find to be frivolous and immaterial.[2]

5. The sole valid question raised by the petitioner relates to the applicant's financial qualifications. The application, as originally filed and as amended September 25, 1973, did not show that the applicant was financially qualified. On November 30, 1973, the applicant was advised by the Commission that the application did not establish its financial qualifications and the applicant was afforded an opportunity to amend. The application was amended on January 3, 1974, but the financial statement showed that the applicant needed additional current and liquid assets of about $4,100 and the applicant was so advised on January 14, 1974. By an amendment filed January 31, 1974, the applicant submitted a letter of credit from Gaylord State Bank, Gaylord, Michigan, extending an unsecured line of credit of $5,000 for one year. Petitioner attacked the validity of this showing by a pleading filed February 12, 1974, alleging, *inter alia*, that unsecured

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[2] For example, petitioner claimed that the applicant failed to show the number of persons to be served by the translator (cured by amendment), that the applicant failed to state that the translator was equipped with automatic circuitry which would place it in a nonradiating mode in the absence of an input signal (the equipment is type accepted and must be so constructed in order to meet type-acceptance requirements), and that the applicant did not file FCC Form 714 indicating whether notification to the FAA of the proposed 38-foot antenna supporting structure had been made. The latter is a routine determination made by the Commission and it was routinely determined that obstruction markings were not required.

lines of credit are normally extended only on a demand basis and that a previous unsecured line of credit of $10,000 extended by Gaylord State Bank should have been shown by the applicant as a current liability rather than as a long-term liability.

6. The letter of credit from the Gaylord State Bank, dated January 17, 1974, filed with the amendment of January 31, 1974, extending an unsecured line of credit of $5,000 to the applicant, was issued specifically in connection with this application; it is, in effect, earmarked for this purpose. Clearly, $5,000 is adequate to meet the costs of construction and operation of the proposed translator for the first year and we do not, therefore, consider or rely upon the applicant's financial statement in determining whether it is financially qualified to undertake and complete this project. We find, therefore, that the applicant is financially qualified.

7. On October 10, 1973, the applicant requested authority to submit an additional pleading (see Footnote 1) which was opposed by petitioner on October 18, 1973. The supplemental pleading deals with new matter introduced in petitioner's reply to the applicant's opposition to the petition to deny. In this proceeding, petitioner has filed seven pleadings, the applicant two. We think that the applicant was entitled to address itself to this new matter and, in our discretion, we grant the request for authority to submit the additional pleading and deny petitioner's opposition thereto.

8. We find that petitioner has raised no substantial or material questions of fact. We further find that the applicant is qualified to construct, own and operate the proposed new translator station and that a grant of the application would serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That the petition to deny filed herein by Harrington Broadcasting Company and its opposition to the applicant's request for authority to submit an additional pleading, ARE DENIED, consent to submit the additional pleading IS GRANTED, and the above-captioned application of Alpine Broadcasting Company, IS GRANTED, in accordance with specifications to be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

FCC 74-205

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of AMERICAN CABLEVISION CO., KEENE, MARLBORO, AND SWANZEY, N.H. Request for Special Temporary Authorization	NH001, NH002, NH003

MEMORANDUM OPINION AND ORDER

(Adopted February 27, 1974; Released April 5, 1974)

BY THE COMMISSION: COMMISSIONER WILEY CONCURRING AND ISSUING A STATEMENT.

1. On September 20, 1973, American Cablevision Company, a division of TelePrompTer Cable Services, Inc., and operator of cable systems at Keene, Marlboro, and Swanzey, New Hampshire, filed a "Request for Special Temporary Authorization" seeking a waiver of Sections 76.11(a) and 76.59(b) of the Commission's Rules[1] pending action on its applications for certificates of compliance filed on the same date.[2] American requests permission to substitute immediately the signal of WSBK-TV, Boston, Massachusetts, for that of WKBG-TV, Cambridge, Massachusetts, on the above-captioned cable television systems.[3]

2. American provides 12-channel service to approximately 6,411 subscribers at Keene, Marlboro, and Swanzey, New Hampshire, from a common headend. It currently carries the following television stations:

WTIC-TV (CBS, Channel 3) Hartford, Connecticut.
WCDC (CBS, Channel 19) Adams, Massachusetts.
WBZ-TV (NBC, Channel 4) Boston, Massachusetts.
WCVB-TV (ABC, Channel 5) Boston, Massachusetts.
WGBH-TV (Educ., Channel 2) Boston, Massachusetts.
WNAC-TV (CBS, Channel 7) Boston, Massachusetts.
WKBG-TV (Ind., Channel 56) Cambridge, Massachusetts.

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[1] Section 76.11(a) states: "No cable television system shall commence operations or add a television broadcast signal to existing operations unless it receives a certificate of compliance from the Commission."

Section 76.59(b) provides in pertinent part: "Any such cable television system may carry sufficient additional signals so that, including the signals required to be carried pursuant to paragraph (a) of this section, it can provide one independent television station."

[2] We now pass only on American's "Request for Special Temporary Authorization." We do not rule on American's pending applications for certificates of compliance (CAC-3076-3078), which may involve questions other than those which we decide today.

[3] Springfield Television Broadcasting Corporation, licensee of Television Station WWLP, Springfield, Massachusetts, and Television Station WRLP, Greenfield, Massachusetts, initially opposed American's petition, but withdrew its opposition on January 4, 1974.

WRLP (NBC, Channel 32) Greenfield, Massachusetts.
WSMW-TV (Ind., Channel 27) Worcester, Massachusetts.
WEKW-TV (Educ., Channel 52) Keene, New Hampshire.
WMUR-TV (ABC, Channel 9) Manchester, New Hampshire.

These communities are located within the Greenfield, Massachusetts, smaller television market, and thus American may import only one independent signal pursuant to Section 76.59(b) of the Rules. American has grandfather rights to the distant independent signals of WKBG-TV and WSMW-TV under Section 76.65,[4] but with the deletion of WKBG-TV, and addition of WSBK-TV, it may no longer carry two distant independent signals as a matter of right. In order that it may continue carriage of two independent stations, American seeks a waiver of Section 76.59(b) of the Rules.

3. American argues that immediate substitution of WSBK-TV is warranted because its subscribers are interested in seeing the Boston Bruins' hockey games which are broadcast by WSBK-TV and whose season began in October. American further contends that the requested substitution is consistent with the Commission's decisions in *Dubuque TV-FM Cable Co.*, FCC 73-357, 40 FCC 2d 393, and *Dixon Cable TV, Inc.*, FCC 73-823, 42 FCC 2d 333. Petitioner notes that should its waiver request be denied, it will have to delete the signal of Station WSMW-TV from its systems. Since Keene, Marlboro, and Swanzey are located within the predicted Grade A contour of WSMW-TV, a struggling UHF station, American argues that such a result would be undesirable.

4. American's reliance on *Dubuque TV-FM Cable Co., supra, and Dixon Cable TV, Inc., supra*, is misplaced. In those cases, the cable television systems were authorized to carry stations which broadcast particular sporting events, and the broadcast rights to those games subsequently were transferred to stations which the cable television systems were not authorized to carry. We permitted signal substitution in those cases in order to prevent withdrawing attractive programming from subscribers who had grown accustomed to it. In this case, however, WKBG-TV has not broadcast the Bruins' hockey games since 1967. Denial of a waiver, therefore, would not disrupt established viewing habits. Nevertheless, we will grant the requested relief. To deny the waiver, and, in effect, force American to delete WSMW-TV would deny the benefits of continued cable carriage to a struggling UHF station in communities that can be reasonably considered within the station's market area, and where it has been attempting to maintain and develop audience it seeks in order to survive. We stress, however, that we are not creating a precedent which arguably would support signal substitution whenever highly appealing programming is available on previously unauthorized signals, but

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[4] **76.65—Grandfathering provisions.** "The provisions of §§ 76.57, 76.59, 76.61, and 76.63 shall not be deemed to require the deletion of any television broadcast or translator signals which a cable television system was authorized to carry or was lawfully carrying prior to March 31, 1972, provided, however, that if carriage of a signal has been limited by Commission order to discrete areas of a community, any expansion of service will be subject to the appropriate provisions of this subpart. If a cable television system in a community is authorized to carry signals, either by virtue of specific Commission authorization or otherwise, any other cable television system already operating or subsequently commencing operations in the same community may carry the same signals. (Any such new system shall, before instituting service, obtain a certificate of compliance, pursuant to § 76.11.)"

rather are granting the requested relief based upon the particular facts of the instant case. In view of the public's interest in the Bruins' hockey games, we will allow American to begin immediate carriage of WSBK-TV, until its pending applications for certificates of compliance can be acted upon.

In view of the foregoing, the Commission finds that a grant of the above-captioned request for special temporary authorization would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Request for Special Temporary Authorization," filed September 20, 1973, by American Cablevision Company IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

CONCURRING STATEMENT OF COMMISSIONER RICHARD E. WILEY

I concur in this action because it permits American Cablevision to select the distant independent signal which it believes will best serve the needs of its subscribers and, at the same time, permits continued cable carriage of a struggling UHF station in cable communities which can reasonably be said to be within that station's market area. A denial of the waiver request would in no way deter American from exercising its right to select the distant signal it wishes in accordance with our rules, but it would work a disservice to both cable subscribers and the UHF station because it would force the cable operator to give up grandfathered signals it is otherwise willing to carry. In my judgment, this would result in an application of our rules with a vengeance for no apparent public interest reason. A grant of the waiver request, on the other hand, permits one important difference—continued carriage of a nearby grandfathered UHF station which is in apparent need of, and can be expected to benefit from, such carriage.

I am concerned, however, that our action today may be interpreted as an invitation to substitute signals based upon highly appealing programming available on previously unauthorized signals. In the event that such requests come before the Commission, I intend to rest my judgment on the express language that this decision in no way constitutes a precedent for such blanket substitutions in the absence of some persuasive public interest rationale.

FCC 74-296

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE & TELEGRAPH CO., (LONG LINES DEPARTMENT) TRANSMITTAL NO. 11935; AND REVISIONS OF THE WIDE AREA TELECOMMUNICATIONS SERVICE (WATS) TARIFF FCC NO. 259	Docket No. 19989

MEMORANDUM OPINION AND ORDER

(Adopted March 28, 1974; Released April 5, 1974)

BY THE COMMISSION:

1. On January 15, 1974, revised tariff schedules were filed by the American Telephone and Telegraph Company-Long Lines Department (AT&T) under transmittal No. 11935 to become generally effective March 16, 1974. At the request of the Commission AT&T postponed the general effective date to April 1, 1974.[1] These revised tariff schedules apply to the interstate WATS service provided throughout the United States. Petitions for Suspension (and investigation) were timely filed by Computoll Corporation (Computoll), The Committee of Corporate Telephone Users (The Committee), Aerospace Industries Association (AIA), Computerized Automotive Reporting Service Inc. (Computerized Automotive), McGraw-Hill, Inc. (McGraw-Hill), National Data Corporation (National Data), Ad Hoc Telecommunications Committee (Ad Hoc), and MCI Telecommunications Corporation, Microwave Communications, Inc., MCI New York West, Inc. and Interdata Communications, Inc. (MCI). The National Retail Merchants Association (NRMA) filed a statement in support of Petitions for Suspension, while the Common Carrier Bureau's Trial Staff in Docket No. 19129 (Trial Staff) filed a petition requesting that any investigation of the proposed WATS Tariff Revisions be included in that proceeding.[2] AT&T has filed a reply opposing the Petitions for Suspension.

2. At the present time WATS is offered on both a Full Time and Measured Time basis. Under Full Time service the customer is provided an access line which he may use 24 hours a day, 7 days a week, for which he pays a flat monthly rate irrespective of the time of use or number or duration of calls made. In Measured Time service the access line is also continuously available but the basic monthly rate covers 10 hours of use per month with additional charges applying for each additional hour or portion thereof of use during the month.

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[1] Certain changes are effective six months later as hereinafter specified.

[2] Numerous letters protesting the increased WATS rates have also been received by the Commission.

In both Full Time and Measured services, the customer has a choice of six progressively larger service areas. The largest includes the entire continental United States, excluding Alaska and the customer's home state. In both monthly and additional period, charges vary generally with the size of the geographical areas serviced. All outward WATS calls are dialed by the customer, i.e., outward WATS does not include person-to-person, collect, conference, credit card calls or calls charged to a third number. Inward WATS calls are dialed by the caller and are, in effect, paid for by the inward WATS subscriber.

3. The revised tariffs now before us make substantial and significant changes in the internal rate structure of both outward and inward WATS service. More specifically, the proposed changes may be described as follows:

(1) In the Measured Time service the initial period and additional period rates in the low mileage rate steps are increased and the initial period and additional period rates in the medium and high mileage rate steps are reduced.

(2) The Full Time service is changed to Full Business Day service with a flat rate for 240 hours a month service and additional period rates for usage in excess of 240 hours per month. The additional period rates for usage above 240 hours are set at a level of two-thirds of the equivalent hourly rate for the initial period.

(3) In the Full Business Day service the initial period rates in the low and medium mileage rate steps are increased and the initial period rates in the high mileage rate steps are reduced.

(4) In both the Full Business Day and Measured Time services additional charges are imposed for large volumes of completed calls when the average length of each call is less than one minute.

(5) Two physical terminations will be required for Inward WATS.[3] The first Inward service in each group arranged for either Measured Time or Full Business Day to a service area will require two physical terminations. The usage on the dual terminations will be rated as one service.

(6) The number of geographical Service Areas is reduced from 6 to 5 by combining existing Service Areas 5 and 6.

(7) The following non-recurring charges are increased:

Description of charge	Present	Revised
Installation of service	$10	[1] $50
Move:		
Same premises	10	[1] 25
Different premises	10	[1] 50
Suspension of service	15	50
Maintenance of service	10	25
Adjustment of signal power	10	25

[1] The effective date of these changes are to be delayed 6 months to allow customers an opportunity to analyze the effects of the new service structure and rate levels and modify their communications requirements as they deem appropriate.

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[3] The effective date of these changes are to be delayed six months to allow customers an opportunity to analyze the effects of the new service structure and rate levels and modify their communications requirements as they deem appropriate.

(8) A "Conversion Charge" of $25.00 is established to apply to requested changes in class of service, service area, or telephone number assignment subsequent to the initial service installation.[3]

(9) The monthly rates for WATS extension stations are increased as follows:

	Present	Revised
1st station in an exchange	$12.50	$15
Each additional station in an exchange	7.50	10

(10) The allowance for service interruptions is revised by reducing the period for an allowance for Measured Time service to two hours or more, the same as for Full Business Day service. The proposed regulation will provide for an allowance equal to a full day's rate (1/30 of the monthly initial period rate) for an interruption of eight hours or more per day.

(11) Various changes and clarifications are made in the text of the tariff including definition of the following terms: "Customer Exchange Area, Interexchange Channel, Move, Premises, Rate Center, Service Group, Service Terminal."

4. AT&T states that the estimated effect of these revisions will be to increase the charges for about 40% of the existing WATS customers and reduce the charges for about 60% of such customers. However, the carrier alleges that there will be no significant change in total WATS revenues or earnings. In this regard, AT&T states that the changes in the Measured Time monthly rates will result in reductions of about $10 million in net annual revenues; that the changes in Full Time monthly rates will produce a net annual revenue increase of about $5 million; and that increases in non-recurring charges and other changes referred to above will produce an increase of about $5 million a year. The carrier submitted detailed cost and other data to support the tariff changes as required by Sec. 61.38 of the Commission's Rules.

5. AT&T's reasons for making these revisions in the WATS tariffs may be summarized as follows:

> WATS was introduced by AT&T as a service offering in 1961 to meet customer needs for substantial amounts of communications to diverse geographic points. Since the service was designed to utilize the public switched network in a manner which would result in economies as compared to Message Telecommunications Service ("MTS"), WATS rates were set to reflect those economies. During the period since 1961, WATS has experienced substantial growth and yet no significant structure change in the WATS offering has been made since 1967. Thus, it was considered timely by AT&T to now review generally the WATS rate structure, and to reevaluate WATS revenue/cost relationships as well as the relationship of WATS rates to MTS rates. As a result of this analysis, AT&T determined that adjustments should be made to improve the WATS structure.

In addition, AT&T's market analyses show that due to emerging customer applications for the service, such as heavy usage of WATS access lines and large volumes of calls with short average conversation time, these adjustments should be made now so that WATS customers will be able to take full account of the rate changes in their planning.

One purpose of these rate revisions is to establish a schedule which better reflects the costs associated with providing service to various segments of the WATS market. For those customers who receive an increase in charges, those increases simply reflect the costs associated with providing them service.

6. A number of objections to these revisions are advanced by Petitioners. They contend, *inter alia*, that it is unjust and unreasonable for AT&T to align WATS Measured Time rates with MTS rates or to align Full Business Day rates to the revised Measured Time rates; that the establishment of a Full Business Day classification providing for 240 hours of use for an initial period discriminates against heavy users of WATS, since little additional cost is incurred in providing such additional service; that it is discriminatory to impose additional charges for a large volume of completed calls in that this penalizes those subscribers making short duration calls and more efficient use of their facilities; and that this will result in an increase of peak traffic loads on the network, encourage inefficient utilization of communications facilities, and hinder the further development of computer technology. Computoll makes specific allegations to the effect that the proposed tariff revisions prohibit use of customer-provided terminal equipment, in alleged violation of our "Carterfone" decision.

7. Although the changes proposed by AT&T in these WATS tariff revisions appear to be a step in the right direction away from flat-rate pricing toward usage sensitive pricing, we are of the opinion that substantial questions of lawfulness have been raised by petitioners that warrant investigation and hearing. Furthermore, a number of unresolved questions concerning the lawfulness of the WATS service offering have been pending and unresolved in connection with other dockets and it is our judgment that all of these questions should be consolidated and considered in the investigation and hearing which we are ordering herein. A brief review of the status of these unresolved questions will be helpful at this point.

8. On January 12, 1961, we instituted an investigation into the lawfulness of AT&T's initial filing of its WATS service offering in Docket No. 13914 (26 F.R. 378). Following a hearing, the Chief, Common Carrier Bureau issued his Recommended Decision, 37 F.C.C. 688 (1964), and on March 3, 1965, we adopted that Recommended Decision, 38 F.C.C. 475. By this action we concluded that the overall level of the WATS rates at that time appeared to be productive of sufficient revenue to recover the costs incurred in furnishing the service and that the rates appeared to be fully compensatory. Although we terminated the proceedings in Docket 13914, several questions were left unresolved however, concerning the WATS service. These were: (1) the effect of the WATS offering on peak-hour traffic and whether stimulation resulting from either the full-time or measured-time service would cause additional usage with resultant increases in cost; (2) whether in light

of the actual usage of WATS the measured-time users would be bearing a disproportionate share of the costs incurred in furnishing the WATS service and whether the revenue requirements applicable to the total service would be met; and (3) whether there was a need for a full-time class of WATS and whether all service should not be priced on a measured-time basis, with the appropriate full-time rate being established as the maximum charge regardless of usage. In addition, inasmuch as AT&T relied upon the economies made possible by direct distance dialing as justification for the WATS offering, a basic question was raised as to whether the rates applicable to station-to-station calls in the Message Toll Telephone Service (MTS) fairly and adequately reflected those economies or whether the relatively small group of WATS users was being given an undue preference in this respect. On January 12, 1973 AT&T filed increases in the WATS rates pursuant to authority granted by us in Docket 19129 and by Memorandum Opinion and Order, released March 13, 1973, we placed the lawfulness of such revised WATS schedules in hearing in Docket No. 19129 (40 FCC 2d 18 (1973)). We also made it clear in our Memorandum Opinion and Order released August 10, 1973, (42 FCC 2d 302) that it was our intent that the WATS issues in Docket No. 19129 subsumed all of the questions referred to above that were left unresolved in terminated Docket No. 13914. Finally, in dismissing a formal complaint filed by the Associated Students of the University of Arizona (ASUA), we directed the Trial Staff in Docket No. 19129 to give consideration to the reasonableness of the restrictive language in the WATS tariff concerning the use of service by WATS customers (43 F.C.C. 2d 197).

9. With regard to the WATS issues now pending in Docket 19129, Petitioners and AT&T contend that if an investigation and hearing is deemed warranted as to the WATS revised tariff schedules now before us it should be a separate proceeding from Docket No. 19129. The basic reason advanced for the separate proceeding is that of timeliness. Since consideration of the general WATS issues will be deferred until the latter stages of Docket No. 19129, it is contended that inclusion of these WATS tariff revisions in that proceeding may delay resolution of this matter for years. The Trial Staff in Docket No. 19129 stated that it does not object to the establishment of a separate proceeding or to the transfer to that proceeding of the WATS issues currently in Docket No. 19129. We agree that the more orderly manner of proceeding in this matter is the establishment of a separate proceeding which will include the WATS issues currently in Docket No. 19129. This, of course, will include consideration of the issues raised by the aforementioned complaint by the Arizona Students Association. Finally we believe that the prospective issues raised in the pending Computoll complaint should also be considered in this proceeding, i.e., that portion of the complaint that challenges the validity for the present and future of the provision in the WATS tariff as to interconnection. Action on Computoll's request for damages for alleged past unlawfulness of the WATS tariffs will be deferred pending decision herein on the lawfulness of the revised WATS tariffs.

10. Petitioners request that the revised WATS tariff schedules be suspended for the full statutory period of three months and AT&T has

opposed that request. As we have stated, we are aware that by this filing AT&T has attempted to address some of the unresolved questions previously raised with respect to the WATS service, and that the revised tariffs will result in rate reductions for many WATS users. However, substantial increases in charges will also result for many WATS users and significant questions remain unresolved at this time as to the lawfulness of the WATS tariffs and rate structure. Under these circumstances, we believe that we should exercise our discretion and suspend the tariff revisions for the maximum statutory period of three months and enter an accounting order providing for possible refunds.

11. CARS, NRMA, and MCI request that any investigation and hearing in this matter employ procedures similar to those adopted by us in the "Hi-Lo" Docket No. 19919 (Memorandum Opinion and Order released January 25, 1974 (FCC 74–81)). AT&T contends that none of the considerations which prompted the Commission to depart from a trial type hearing are present in the instant case. We believe, however, that the revised WATS tariffs raise questions and issues that lend themselves to the type of procedures we adopted in Docket No. 19919. We believe that the employment of such procedures in this case will best conduce to the proper dispatch of business and the ends of justice and promote the objectives of the Act for expeditious resolution of the issues herein. 47 U.S.C. 154(j) and 204. Thus we will order that such procedures be utilized in the instant proceeding.

12. Accordingly, IT IS ORDERED, That, pursuant to the provisions of Sections 4(i), 4(j), 201, 202, 203, 204, 205, and 403 of the Communications Act of 1934, as amended, an investigation and hearing is instituted into the lawfulness of the revised tariff schedules filed by AT&T submitted with Transmittal No. 11935 including any cancellations, amendments or re-issues thereof.

13. IT IS FURTHER ORDERED, That the issues concerning the lawfulness of the WATS tariff schedules submitted with Transmittal No. 11657 and set for hearing in Docket No. 19129, pursuant to our Memorandum Opinion and Order released March 13, 1973, 40 FCC 2d 18, ARE HEREBY REMOVED from Docket No. 19129 AND CONSOLIDATED into this proceeding.

14. IT IS FURTHER ORDERED, That, pursuant to the provisions of Section 204, the revised tariff schedules filed by AT&T submitted with Transmittal No. 11935 ARE HEREBY SUSPENDED until July 1, 1974,[4] and that AT&T, as to the operation of such tariff schedules shall, in the case of all increased charges and until further order of the Commission, keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and upon completion of the hearing and decision therein, the Commission may by further order, require the refund thereof, with interest, pursuant to Section 204 of the Act, and the carrier shall file such reports on the amounts accounted for as the Chief, Common Carrier Bureau shall require.

15. IT IS FURTHER ORDERED, That, without in any way limiting the scope of the investigation, it shall include consideration of the following:

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[4] The tariff revisions being suspended are those scheduled to become effective April 1, 1974.

(1) Whether the charges, classifications, practices, and regulations published in the aforesaid tariffs are or will be unjust and unreasonable within the meaning of Section 201(b) of the Act;

(2) Whether such charges, classifications, practices, and regulations will, or could be applied to, subject any person or class of persons to unjust or unreasonable discrimination or give any undue or unreasonable preference or prejudice to any person, class of persons, or locality, within the meaning of Section 202(a) of the Act;

(3) Whether the revised tariff schedules conform to the requirements of Section 203 of the Act and Part 61 (47 CFR Part 61) of our Rules implementing that Section;

(4) If any of such charges, classifications, practices, or regulations are found to be unlawful, whether the Commission, pursuant to Section 205 of the Act, should prescribe charges, classifications, practices and regulations for the service governed by the tariffs, and if so, what should be prescribed.

16. IT IS FURTHER ORDERED, That, the following procedures will apply in this proceeding:

(a) The record for decision will consist of all matters submitted for the record by respondents, interested persons and the Common Carrier Bureau trial staff. Interrogatories and information requests and responses thereto shall be part of the record. Such submittals together with supporting documentation and workpapers will be available for public inspection as they are received.

(b) All matters submitted for the record, including answers to interrogatories and responses to information requests, must be identified as to sponsoring party, numbered consecutively and identified with the name of a person by whom or under whose supervision the submittal was prepared.

(c) The source of all data must be clearly and specifically noted. Supporting documents which are not readily available and working papers must be presented with the submittals to which they apply. Statistical studies will be submitted and supported in the form prescribed in Section 1.363 of the Commission's rules.

(d) Original and five copies of all matters submitted for the record as well as of supporting documentation and workpapers must be filed with the Commission. Part I of our Rules governs as to the number of copies for other submissions, such as briefs, pleadings and proposed findings. Matters submitted for the record shall be served on all interested persons filing a notice of intent to participate.

(e) Interrogatories and requests for information must be filed with the Commission and served on the participants to this proceeding. Objections to interrogatories and information requests should be resolved, if possible, by immediate informal conferences between the persons involved and the Trial Staff. If such persons are unable to resolve their differences, the Administrative Law Judge should be notified, and on notification should convene an immediate oral conference of the persons involved. After oral presentations by such persons and the Trial Staff the Judge shall forthwith issue a ruling. Appeals from such rulings shall be governed by 47 CFR § 1.301 except that the Judge shall set an expedited procedure.

(f) Requests for oral proceedings must be filed with the Commission and must be specific as to the issues requiring further evidence, the persons to be cross-examined and the reason why such oral proceedings are required to avoid prejudice. Oral proceedings, if any, will be held before the Administrative Law Judge who will certify the record of such proceedings to the Commission.

17. IT IS FURTHER ORDERED, That the following schedule will be adhered to:

(a) Within 20 days of the release of this order AT&T may supplement the materials submitted pursuant to Section 61.38 of our rules. Any such supplementation, together with the material originally filed will form the evidence upon which it intends to rely. At the same time AT&T should place materials already filed into proper form as described in paragraph 16 at "b" above.

(b) Interested persons may file with the Commission written interrogatories for AT&T witnesses and requests for information within 15 days following the filing of any supplement to AT&T's direct case. Answers to such interrogatories and requests for information shall be filed within 20 days of the filing thereof.

(c) If necessary, further interrogatories and requests for information may be filed within 10 days of filing of answers to the first interrogatories and requests for information. Answers to such second interrogatories and requests for information should be filed within 10 days of the filing thereof.

(d) Interested persons may file material in response to AT&T within ten days following the filing of answers to interrogatories and requests for information which they have submitted in accordance with sub-paragraph (c) above, except that this period will not be tolled pending resolution of conflicts with regard to answers which are not forthcoming but contested.

(e) Any participant may serve interrogatories on other participants filing material in response to AT&T within 15 days of the filing of such responses. Answers to such interrogatories shall be filed within 20 days of the filing thereof.

(f) If necessary, further interrogatories on other participants may be filed within 10 days of the filing of such answers to the first interrogatories. Answers to such second interrogatories shall be filed within 10 days of the filing thereof.

(g) AT&T may file material in reply to that submitted by other participants within ten days following the filing of answers to all interrogatories and requests for information which they have submitted in accordance with sub-paragraph (f) above, except that this period will not be tolled pending resolution of conflicts with regard to answers which are not forthcoming but contested.

(h) Proposed findings of fact and conclusions of law may be filed by any participant within 30 days of the filing of the last filed responses to interrogatories and requests for information.

(i) Replies to the Proposed Findings of Fact and Conclusions of Law may be filed by any participant within 15 days of the filing of such findings and conclusions.

18. IT IS FURTHER ORDERED, That the Petitions ARE GRANTED to the extent noted herein and OTHERWISE DENIED.

19. IT IS FURTHER ORDERED, That AT&T and all carriers listed in AT&T's Tariff F.C.C. Nos. 259 and 264 as concurring carriers are hereby made respondents herein, and that all other interested persons wishing to participate may do so by filing a Notice of Intent to Participate within 10 days of the release of this order.

20. IT IS FURTHER ORDERED, That a Trial Staff of the Common Carrier Bureau will participate in this proceeding and shall be separated from the Commission and the Administrative Law Judge.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

FCC 74-297

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TELEPHONE & TELEGRAPH CO., LONG LINES DEPARTMENT (A.T. & T.). REVISIONS OF WIDE AREA TELEPHONE SERVICE (WATS), TARIFF FCC NO. 259 AND PRIVATE LINE SERVICE (PLS), TARIFF FCC NO. 260 AND THE WESTERN UNION TELEGRAPH CO. (WESTERN UNION), REVISIONS OF TARIFF FCC NO. 254	Docket No. 19419

MEMORANDUM OPINION AND ORDER

(Adopted March 28, 1974; Released April 5, 1974)

BY THE COMMISSION:

1. On March 5, 1974, revised tariff schedules were filed by the American Telephone and Telegraph Company—Long Lines Department (AT&T) under Transmittal No. 11983 to become effective March 25, 1974.[1] These schedules revise AT&T's Private Line Service Tariff F.C.C. No. 260, by offering (a) a new type of channel conditioning designated as High Performance Data Conditioning—Type D1, applicable to Type 3002 data channels, and (b) a new Data Phone data set, designated as Type 209. The Type 209 data set is a synchronous, binary 9600 bit per second (bps) data set offered for use on a 2-point Type 3002 data channel. One of the features of the Type 209 data set is a variable speed input interface which will accept and deliver any combination of 2400, 4800, 7200, or 9600 bps customer input signals up to a maximum of 9600 bps. The tariff revisions require that AT&T's new 209 data set be used only with the new High Performance Data Conditioning—Type D1 channel. The revisions also provide for Remote Terminal Interface Arrangements to extend the interface leads of the Type 209 data set to customer terminal equipment when such equipment is located more than 50 feet from the Type 209 data set.

2. In our Memorandum Opinion and Order herein released February 7, 1972, we suspended and instituted an investigation into the lawfulness of tariff revisions filed by AT&T which, among other things, reduced the rates for certain AT&T provided data sets that were competitive with independent suppliers of data modems (33 FCC 2d 518). We stated at that time that we would consider particularly the allegations made by the independent suppliers of competing modems that AT&T's rates and practices were anti-competitive. Again,

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[1] Special Permission was granted AT&T on March 4, 1974, to file these revisions on less than statutory notice to meet the service requirements of certain customers.

in our Memorandum Opinion and Order released January 12, 1973, in the same Docket, we noted that the increased substitute rates subsequently filed by AT&T for such data sets and the charges for a new Type 208 data set offered by AT&T raised essentially the same anticompetitive questions and that the issues in Docket No. 19419 would encompass such additional questions (39 FCC 2d 637).

3. The Independent Data Communications Manufacturers Association, Inc. (IDCMA) has filed a petition to suspend and designate these revisions for hearing. In its petition, IDCMA raises certain questions, *inter alia*, concerning the use by AT&T of "incremental costs", the alleged cross-subsidization of advertising costs, the assumed useful life of the 209 data set, the alleged improper marketing practices of AT&T, and the alleged failure of AT&T to separate its channel costs and charges from its station equipment costs and charges.

4. The revised tariff schedules presently before us, whereby AT&T offers a new data set Type 209 to be used with High Performance data channels, raise essentially the same anti-competitive questions that we have previously designated for hearing in connection with other data sets offered by AT&T. Although AT&T has submitted cost and other data in support of its proposed charges for the new data set, we are unable to determine at this time that the tariff revisions now before us are reasonable and otherwise lawful. Accordingly, we are setting these revisions for hearing under the same issues heretofore specified in this docket with respect to other data sets of AT&T in order that the questions raised by IDCMA may be considered in this docket proceeding.

5. We shall not, however, suspend the effectiveness of these revised tariffs. The revisions offer a higher quality of PLS data service not now available to the public under the AT&T tariffs and we believe that the public should be able to obtain such improved service pending further hearings on the lawfulness thereof. This consideration, in our judgment, outweighs any contentions that the effective date of the revisions should be suspended in order to prevent any alleged anticompetitive effects of the new service offering. We have heretofore stated that we will not delay the institution of new competitive specialized services by existing carriers pending resolution of questions concerning the appropriate pricing and costing principles for such competitive services, *Specialized Common Carrier Services*, 29 FCC 2d 870; Page 917 (1971), and we believe that this principle should apply to the tariff offerings now before us.

6. Accordingly, IT IS ORDERED, That pursuant to Sections 201, 202, 203, 204, 205, and 403 of the Communications Act of 1934, as amended, an investigation is instituted herein into the lawfulness of the tariff schedules filed March 5, 1974, by AT&T with its Transmittal No. 11983, including any cancellations, amendments or reissues thereto; and that the issues heretofore specified in this docket SHALL ALSO APPLY to such revised tariff schedules.

7. IT IS FURTHER ORDERED, That IDCMA's Petition For Suspension IS GRANTED to the extent noted herein and OTHERWISE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

FCC 74-290

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 15 OF THE COMMISSION'S RULES AND REGULATIONS TO PERMIT BIOMEDICAL RADIO TELEMETERING IN THE BAND 38-41 MHz	Docket No. 19846 RM-1945

REPORT AND ORDER

(Adopted March 28, 1974; Released April 2, 1974)

BY THE COMMISSION:

1. On October 24, 1973, the Commission, in response to a petition (RM-1945) from Cardiac Electronics Inc., issued a Notice of Proposed Rule Making (NPRM) to amend Part 15 of the Rules and Regulations to provide for the operation of low power biomedical telemetering equipment in the frequency band 38-41 MHz. The NPRM was published in the Federal Register on October 29, 1973 (38 FR 29818). Timely comments were filed by the New Jersey Hospital Association and by SED Systems Ltd.

2. In its comments, the New Jersey Hospital Association supported the proposed rule making, stating that this additional band for biomedical telemetry will provide greater flexibility to those involved in the health care industry.

3. In comments filed by SED Systems Ltd., the Commission was asked to expand the use of the 38-41 MHz band to include telemetering of data from high voltage power transmission lines. SED Systems Ltd. cited the similarities between its request and that of Cardiac Electronics as a justification for including this type of operatiton in the band. The Commission, however, has noted several dissimilarities, particularly with regard to the operating environment and increased power. SED Systems Ltd. operations might best be met on frequencies which are already allocated to the Power Radio Service.

4. The Notice specifically invited comments relating to the proposed use of the band 38-41 MHz for biomedical telemetry. The comments filed by SED Systems Ltd. only superficially addressed the subject rule making and, for the most part, were outside the scope of this proceeding. The Commission believes that any new use of this band at this time would require a further rule making proceeding.

5. In view of the foregoing, the Commission finds that adoption of a rule amendment permitting biomedical telemetry in the band 38-41 MHz will be in the public interest. The conditions and limitations on the use of such systems are set forth in the Appendix.

6. Accordingly, Pursuant to authority contained in Section 4(i) and 303 of the Communications Act of 1934, as amended, IT IS

ORDERED, that effective May 14, 1974, Part 15 of the Commission's Rules IS AMENDED, as shown in the attached Appendix and this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Part 15 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. § 15.201 is amended by adding a new paragraph (e) to read as follows:

"§ 15.201 Frequencies of Operation.

* * * * * * *

"(e) Biomedical telemetering devices may be operated in the frequency bands and under the conditions set out in § 15.216."

2. § 15.216 is amended by deleting the present text of paragraphs (a), (b) and (c) and inserting the following new text:

"§ 15.216 Biomedical Telemetering Devices.

"(a) Biomedical telemetering devices may be operated in the following frequency bands: 38–41 MHz, 174–216 MHz.

"Operation in these bands is not subject to the duty cycle limitation in § 15.211 (a)(3).

"NOTE.—Section 15.3 requires that a biomedical telemetering device operating under the provisions of this section must accept harmful interference. Adequate safeguards shall be incorporated into any such biomedical telemetry system (as a cardiac monitoring system) to minimize the risk of harm to the patient as a result of interference received by such a system from any authorized radio service.

"(b) Biomedical telemetery devices may operate with a bandwidth of 200 kHz subject to the conditions in paragraph c of this section.

"(c) The emissions from a biomedical telemetering device shall not exceed the field strength limits given below.

"Operating frequency MHz	Field strength	
	On the operating frequency	On harmonics and other spurious emissions on frequencies outside the authorized bandwidth
38-41	10 μV/m at 50′	10 μV/m at 10′
174-216	150 μV/m at 100′	15 μV/m at 100′

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FCC 74-299

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF SECTION 74.1103 OF THE COMMISSION'S RULES AND REGULATIONS AS IT RELATES TO CATV SYSTEMS WITH FEWER THAN 500 SUBSCRIBERS } Docket No. 18785

REPORT AND ORDER

(Adopted March 28, 1974; Released April 4, 1974)

BY THE COMMISSION:

INTRODUCTION

1. On January 16, 1970, the Commission, on its own motion, released a *Notice of Proposed Rule Making in Docket No. 18785*.[1] By this notice, interested parties were invited to file comments on a proposal that the signal carriage and non-duplication provisions of the Rules (former Section 74.1103)[2] be amended by the addition of the following footnote:

> NOTE.—As used in Section 74.1103, the term "community antenna television system" shall not include systems with fewer than 500 subscribers.

2. This action derived from a Public Notice of March 7, 1968[3] in which the Commission announced a modification of its processing priorities involving petitions for waiver of (former) Section 74.1103, whereby, action would be deferred in cases involving cable television systems having fewer than 500 subscribers. The Commission stated that matters involving small cable systems, if processed in chronological order, would engender difficulties out of proportion to their impact on broadcasting, and that such systems would be most likely to present persuasive hardship cases which would justify waivers. It was further stated that a modification of our processing priorities would allow available staff to direct its attention to cases involving larger cable systems where potential adverse impact on broadcasters would be greatest.

3. The Commission's experience with the temporary processing procedure suggested the desirability of adopting a permanent policy which would fully exempt systems having fewer than 500 subscribers from the carriage and exclusivity rules. The instant proposal was based upon the rationale that such an exemption would not result in any substantial adverse impact on broadcasters and would relieve small cable systems from the burden of compliance with these rules.

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[1] FCC 70-65, adopted January 14, 1970.

[2] Former Section 74.1103, in its entirety may be found in Appendix B.

[3] "Temporary Modification of Processing Priorities in Section 74.1103 Waiver Cases," FCC 68-259.

SUMMARY OF COMMENTS

4. In joint comments filed by several operators of cable television systems having fewer than 500 subscribers,[4] the Commission is urged to adopt the proposed exemption on the grounds that compliance with the non-duplication rules imposes financial and manpower drains on small systems which are disproportionate to the potential impact such systems may have on local broadcasters. It is stated that the cost of switching equipment needed in order to provide non-duplication ($2.-500–$3,500) can consume a substantial portion of a small system's annual gross revenues, which seldom reach $25,000 per year. In addition, it is argued that the manpower and maintenance costs, which are integrally related to the cost of the equipment, present a problem of substantial consequence when considering that operation and maintenance of a system having up to 750 subscribers can normally be performed by one person while two persons can service a system of 750 to 2,500 subscribers.

5. The Jerrold Corporation, National Trans-Video, Inc., and Television Communications Corporation also support the proposal. In addition to pointing out the potential benefits this change in the rules will have on small operators, these parties state that "the CATV industry has long been of the opinion that the theoretical rationale for the program exclusivity rules lacked the factual justification so important to their being adjudged fair and equitable," and such "questionable restrictions on CATV should therefore be withdrawn."

6. The National Cable Television Association (NCTA) takes the position that CATV has never had an adverse effect on broadcasting, and, therefore, the non-duplication restrictions should be removed from all cable ssytems. NCTA states that the carriage priority provisions of the non-duplication rules, which are based upon predicted television signal contours, do not take into account the actual availability of signals off the air to television viewers in the area served by a cable system. The result, they aver, hardly serves the public interest when cable systems must carry signals of poor quality and must afford such signals protection against superior quality signals of a lower priority. Additionally, they point out that the effect of the rules often results in one local signal (e.g. grade A contour) being blacked out in order to protect another local signal (e.g. principle community contour); and although there are arguments to be made for protecting local signals against distant signals, there is no public interest served by protecting local signals from other local signals.

7. The NCTA enumerates several problems which, they state, occur in the day to day implementation of the non-duplication rules. They cite such examples as (a) power failures and mechanical malfunctions which prevent proper operation of switching equipment; (b) inaccurate program notices given to CATV operators by broadcasters which result in inadvertent deletion of the last ten to twenty minutes of a movie or special program; (c) mistaken notices, whereby a broadcaster does not carry a program for which non-duplication protection

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[4] Joint comments filed by AMECO, Inc., American Cable Television, Inc., Blatt Bros. TV Cable Corporation, Communications Properties, Inc., Cotulla Cable TV, Inc., and Midwest Cable TV, Inc.

has been requested, which results in the inability of cable subscribers to view that program on any channel, and; (d) programs which run longer than anticipated, such as sports events, network movies and speeches by the President or Vice President, and are blacked out by automatic switching equipment before they have ended because the pre-programmed equipment cannot compensate for last-minute changes. These problems are particularly onerous for smaller systems which, it is said, cannot afford the manpower needed to readjust the equipment in such situations and which often have remote switching devices located at a headend that cannot be easily reached on short notice. NCTA states, "The rationale for imposing non-duplication rules upon CATV systems, that CATV unfairly competes with and has an adverse economic effect upon broadcast television, does not apply to such small CATV systems," since there simply aren't enough subscribers to such systems to dilute a television station's viewing audience to any significant degree.

8. Comments from broadcast interests reflect a different view of the proposal.[5] Palmer Broadcasting Company objects to the proposal based upon the possibility of cumulative impact of "under 500 systems" if they could ignore the request of a local television station for carriage and/or duplication protection without being held to any procedural requirements whatsoever. Although recognizing that there may be cases where a waiver of the rules is warranted for a system that is both small in size and income and can demonstrate the need for such relief, Palmer argues that such a "radical shift" in Commission policy would "free on a permanent basis a whole class of parties regardless of the equities of each case" and would create the risk of serious harmful impact which would threaten the continued stability of television service achieved by the Commission in balancing conflicting interests under its current rules. Palmer questions an exemption from the carriage rules which would permit cable systems not only to duplicate a local station, but completely replace it with a distant signal of its own choosing. They argue that broadcast stations and small cable systems can now negotiate private agreements, whereby a broadcaster might be persuaded to accept something less than full protection under (former) Section 74.1103; but, with the proposed change, such bargaining would be impossible. They state that the adoption of the proposed rule, for these and other reasons, would lead to a chaotic situation.

9. The National Association of Broadcasters (NAB) argues that proposed rule would effect a complete change in Commission policy without any relevant factors having been advanced, and that the proposed rule bears no relationship to the temporary procedures instituted in 1968. They state that an exemption from the carriage and non-duplication rules for all systems having fewer than 500 subscribers would affect a large number of households nationwide, and would have an adverse impact on local stations, particularly those in small television markets which depend on small communities for a substantial portion of their audience. NAB contends that such small market

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[5] A complete list of the parties filing comments in this proceeding may be found at Appendix D.

television stations cannot afford fractionalization of their audiences which would occur if small cable systems are permitted to bypass local stations.

10. The Association of Maximum Service Telecasters (AMST) contends that the cumulative impact of the proposed exemption from carriage and non-duplication would be very severe, and that small market stations can least afford the protracted proceedings they state would be necessary in order to obtain carriage and non-duplication via special relief proceedings. It is further stated by both NAB and AMST that there would be no decrease in the Commission waiver backlog if this rule were adopted, due to the potential increase in petitions filed by broadcasters. Several broadcasting interests argue that the carriage requirements in particular pose no insupportable burdens for cable systems, large or small, and that the proposed rule would invite non-carriage of local signals. Additionally, since the proposed amendment would permit non-carriage of local stations, it represents a departure from the Commission's fundamental allocations policy which assigns local television stations and requires them to meet the needs and interests of the communities within their respective service areas.

11. The American Broadcasting Company (ABC) and others argue that an exemption from the carriage and non-duplication rules, based solely upon system size, cannot be justified. Both AMST and ABC state that if such an exemption is granted, however, that the Commission should require new systems to comply with the rules, particularly if it appears evident that such systems will, at some point, have more than 500 subscribers. AMST suggests that the exemption should not be extended to any CATV system having a total population within its franchise area of 3,000 or more, since, based upon a predicted average of 3.5 persons per household and cable penetration of 60 per cent, it could be predicted that there would be 500 subscribers in that community.

12. The National Association of Educational Broadcasters (NAEB) makes arguments substantially similar to those advanced by other broadcasting interests, stating that the Commission's instant proposal provides more relief than is needed, and could engender numerous procedural and substantive difficulties which transcend the merits of the proposal. Generally NAEB stresses the importance of the mandatory carriage rules to local educational stations, and argues for maintaining the existing system of considering special relief petitions on a case-by-case basis. NAEB suggests that if some relief is deemed necessary by the Commission, it should be modified to apply only to the program exclusivity portion of (former) Section 74.1103, where a more substantial showing of hardship to the small systems may be made due to the additional expense and effort required for switching. NAEB states that if the reasons for creating a blanket exemption are thought to be compelling, it should apply only to systems of 100 subscribers or less.

DISCUSSION AND CONCLUSIONS

13. With the adoption of our *Cable Television Report and Order*[6] in February, 1972, the Commission established a comprehensive new structure for the regulation of cable television. Although the new rules supersede, in pertinent part, the provisions of former Section 74.1103[7] the substantive questions raised in Docket 18785 remain to be resolved. In our discussion we will take up the issues of signal carriage and program exclusivity separately, for these two areas, in our judgment, represent disparate policy considerations requiring individual treatment.

Signal carriage

14. Our cable television rules have, since the adoption of our *First Report and Order* in 1965,[8] contained provisions intended to assure carriage of all television stations within their primary service areas. Because cable systems generally desire to carry as many television broadcast signals as possible, the mandatory signal carriage provisions of our rules have generally met with little opposition and have caused few difficulties from the point of view of the cable television system operator. However, during the period following the adoption of our 1966 rules[9] there were a great many small cable systems in existence having the technical capacity to carry no more than three or five television signals. This limited channel capacity was often insufficient to permit the operators of such systems to comply with our mandatory carriage rules without having to engage in extensive system rebuilding. These difficulties, when considered in conjunction with other relevant factors mentioned in our *Notice of Proposed Rule Making* in this proceeding, suggested the desirability of exempting small systems from compliance with our signal carriage rules.

15. In the past few years, however, cable television technology has advanced to a significant degree, and many smaller systems have been rebuilt or upgraded substantially. As a result, the vast majority of cable systems now possess ample technical capacity to enable them to fully comply with our carriage rules. None of the comments filed in this proceeding make a sufficiently persuasive showing of hardship to justify an exemption for even this limited class of small systems. Our present signal carriage rules constitute a complex formulation of provisions through which the Commission has attempted to strike a balance between the often conflicting interests of broadcasters and cable television operators. These rules provide the cornerstone of our overall regulatory structure for cable, assuring broadcasters that they will continue to be able to reach their natural audience markets. We recognize, of course, that some cable systems still labor under special hardship situations; however, our existing special relief procedures provide an adequate method for dealing with cases involving exceptional circumstances which may warrant waiver of the rules. For the aforemen-

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[6] *Cable Television Report and Order*, 36 FCC 2d 143 (1972).

[7] Sections 76.91–76.97 of the Rules embody the provisions of former Section 74.1103, with some modifications. See Appendix C. Our signal carriage rules are now contained in Subpart D, Section 76.51–76.65 of the Rules.

[8] *First Report and Order in Docket Nos. 14895, 15233*, 38 FCC 683 (1965).

[9] *Second Report and Order in Dockets Nos. 14895, 15233, and 15971*, 2 FCC 2d 725, (1966).

tioned reasons, we are not adopting the proposed exemption from our signal carriage rules.

Network program exclusivity

16. The program exclusivity (non-duplication) provisions of (former) Section 74.1103 were established in conjunction with mandatory signal carriage rules for the purpose of preventing a loss or diminuation of television broadcasting service in areas served by cable television systems. Commission studies which examined the potential impact of cable systems operating in the primary service areas of television stations indicated that duplication of local television station programming via cable carriage of signals not ordinarily available off-the-air in the community of the system could cause substantial audience fractionalization and a resultant loss of advertising revenues which could threaten the economic viability of local stations.[10] In view of the Commission's fundamental statutory responsibilities under the Communications Act [11] and our basic policy of encouraging the development of local television stations to serve the needs and interests of local communities, we determined that some restrictions were needed to limit cable system duplication of locally carried programming in order to avert potential adverse economic impact on broadcasters.

17. The exclusivity provisions of Section 74.1103 [12] were based on a system of priorities, whereby local television stations would be afforded program exclusivity on cable systems located within the stations' Grade B contours, as against duplicate programming carried on the same day by lower priority stations. From highest to lowest, the signal strength priorities were Principal Community, Grade A, and Grade B.[13] Except for a change from same day to simultaneous protection, we have retained the substantive provisions of Section 74.1103, as well as the precedents and policies evolved under the prior rules, in our present network program exclusivity rules.[14]

18. Following the adoption of our *Second Report and Order*, in 1966, the Commission received numerous petitions for special relief from cable systems seeking waivers of the exclusivity rules. In order to avoid any substantial weakening of the effect of the rules, we have required a showing of special hardship or "unusual or exceptional" circumstances by cable systems seeking waivers. The heavy burden of proof we have imposed on cable systems is readily apparent from the fact that virtually no waivers of the exclusivity rules have been granted by the Commission. However, while we have strictly enforced exclusivity as a general rule, we have at the same time recognized that small cable systems encounter particular hardship if forced to fully

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[10] *Id.*

[11] The Commission is charged with the duty of executing the policy the Communications Act to "make available, so far as possible, to all people of the United States, a rapid, efficient, nationwide and worldwide wire and radio communication service" (47 U.S.C. § 151) and "generally to encourage the larger and more effective use of radio in the public interest" (47 U.S.C. § 303(g)). The Commission is also required to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same" (47 U.S.C. § 307(b)).

[12] See Appendix B.

[13] An additional fourth priority was established for television translator stations, with 100 watts or higher power, licensed to the community of the system.

[14] Our *Notice of Proposed Rule Making* in this proceeding did not contemplate the Commission's new syndicated program exclusivity rules. Therefore, our consideration of the proposed exemption will be limited solely to network program exclusivity.

comply with program exclusivity. Therefore, in 1968, we acted to temporarily relieve some small systems from the burdens of compliance by implementing a modified procedure for processing Section 74.1103 waiver requests. Under this procedure, action was deferred in cases involving cable systems having fewer than 500 subscribers, on the grounds that such systems would be least likely to have any substantial adverse economic impact on broadcasters and would be most likely to present persuasive cases of hardships that would warrant waivers of the rules. It was felt that these small systems, being typically one or two person operations, constituted a unique class, deserving of special consideration in deference to their limited size and resources.

19. During the six years which have elapsed since our modified processing procedures were implemented, we have been able to gain valuable experience in determining the effect this temporary waiver policy has had on broadcasters, as well as the potential effects a permanent waiver may have. We have reviewed information submitted by the parties filing comments in the instant rule making proceeding as well as data provided in conjunction with petitions in opposition to pending exclusivity waiver requests. Current statistics on cable penetration in representative sample television markets have also been examined.

20. Based upon the information before us, it is clear that in the great majority of television markets across the nation, the cumulative number of homes served by cable systems having fewer than 500 subscribers constitutes a very small percentage of the total television households reached by broadcast stations. We have previously stated that we would favor some restrictions on the ability of cable systems to duplicate the programs of local broadcasters, *unless* we were convinced that the impact of cable system competition on them would be negligible.[15] In light of our past experience with the temporary waiver policy, it is our judgment that cable systems having fewer than 500 subscribers could have only a negligible adverse impact on broadcasters, and therefore, should be exempted from our network program exclusivity rules. We have seen no deleterious effects on broadcasters and, in fact, have never been presented with a persuasive showing of substantial adverse economic impact occurring as a result of program duplication by cable systems having fewer than 500 subscribers. Conversely, the costs of equipment and manpower needed by small systems in order to comply with the non-duplication rules does have a substantial financial impact on such systems when viewed in relation to their gross revenues.

21. Contrary to the assertions of various broadcasting interests, we are not embarking on a shift in Commission policy by adopting the proposed exemption from the exclusivity rules. Rather, we are codifying or making formal what has in substance been an informal Commission policy since 1968. We have determined that this exemption will relieve a limited class of small cable systems from the burdens of compliance with our network program exclusivity rules without adversely affecting television broadcasting stations. Only in television markets where an unusually large number of small systems are situated, will

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[15] Note 8, *supra* at 38 FCC 683, 706 (1965).

there exist a potential risk of adverse economic impact to broadcasters. In cases presenting special hardship situations, we will consider appropriate relief pursuant to Section 76.7 of the Rules.

22. In view of the foregoing, the Commission finds that adoption of an exemption from our network program exclusivity rules for cable television systems having fewer than 500 subscribers would be consistent with the public interest.

23. Authority for the rules adopted in the Appendix attached hereto, is contained in Sections 2, 3(a)(b), 4(i)(j), 301, 303, 307(b), 308, 309, and 403 of the Communications Act of 1934, as amended.

24. Accordingly, IT IS ORDERED, That Part 76 of the Commission's Rules and Regulations, IS AMENDED, effective May 14, 1974, as set forth in Appendix A attached. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

APPENDIX A

Part 76 of Chapter I Title 47 of the Code of Federal Regulations is amended as follows:

In Section 76.95, a new paragraph (c) is added to read as follows:

"SECTION 76.95 EXCEPTIONS.

* * * * * * *

"(c) Any cable television system, (as defined in Section 76.5(a)), having fewer than 500 subscribers need not comply with the provisions of Sections 76.91 and 76.93."

APPENDIX B

FORMER SECTION 74.1103

§ 74.1103 REQUIREMENTS RELATING TO DISTRIBUTION OF TELEVISION SIGNALS BY COMMUNITY ANTENNA TELEVISION SYSTEMS.

No community antenna television system shall supply to its subscribers signals broadcast by one or more television stations, except in accordance with the following conditions:

(a) *Stations required to be carried.*—Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 watts or higher power translator stations in the following order of priority, upon the request of the licensee or permitee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system or the community of the system is located, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose Grade A contours the system or the community of the system is located, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose Grade B contours the system or the community of the system is located, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system, in whole or in part, with 100 watts or higher power.

(b) *Exceptions.*—Notwithstanding the requirements of paragraph (a) of this section.

(1) The system need not carry the signal of any station, if (i) that station's network programming is substantially duplicated by one or more stations of higher priority, and (ii) carrying it would, because of limited

channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station.

(2) In cases where (i) there are two or more signals of equal priority which substantially duplicate each other, and (ii) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station, the system need not carry all such substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations.

(3) The system need not carry the signal of any television translator station if: (i) The system is carrying the signal of the originating station, or (ii) the system is within the Grade B or higher priority contour of a station carried on the system whose programming is substantially duplicated by the translator; *Provided, however,* That where the originating station is carried in place of the translator station, the priority for purposes of paragraph (e) of this section shall be that of translator station unless the priority of the originating station is higher.

(4) In the event that the system operates, or its community is located, within the Grade B or higher priority contours of both a satellite and its parent station, the system need carry only the station with the higher priority, if the satellite station and its parent station are of equal priority, the system may select between them.

(c) *Special requirements in the event of noncarriage.*—Where the system does not carry the signals of one or more stations within whose Grade B or higher priority contour it operates, or the signals of one or more 100 watts or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

(d) *Manner of carriage.*—Where the signal of any station is required to be carried under this section,

(1) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art);

(2) The signal shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation); and

(3) The signal shall, upon the request of the station licensee or permittee, be carried on the system on no more than one channel.

(e) *Stations entitled to program exclusivity.*—Any such system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.*—Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station, on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(g) *Exceptions.*—Notwithstanding the requirements of paragraph (f) of this section,

(1) The CATV system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than the programs of two networks (including those broadcast by any stations whose signals are being carried and whose program exclusivity is being protected pursuant to the requirements of this section);

(2) The system need not delete reception of a network program which is scheduled by the network between the hours of 6 and 11 p.m., eastern time, but is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for network programming in the time zone involved;

(3) The system need not delete reception of any program consisting of the broadcast coverage of a speech or other event as to which the time of presentation is of special significance, except where the program is being simultaneously broadcast by a station entitled to program exclusivity; and

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

APPENDIX C

SUBPART E—[RESERVED]

SUBPART F—PROGRAM EXCLUSIVITY

§ 79.91 Stations Entitled to Network Program Exclusivity.

(a) Any cable television system operating in a community, in whole or in part, within the Grade B contour of any television broadcast station, or within the community of a 100-watt or higher power television translator station, and that carries the signal of such station shall, on request of the station licensee or permittee, maintain the station's exclusivity as an outlet for network programming against lower priority duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in §§ 76.93 and 76.95.

(b) For purposes of this section, the order of priority of television signals carried by a cable television system is as follows:

(1) First, all television broadcast stations within whose principal community contours the community of the system is located, in whole or in part;

(2) Second, all television broadcast stations within whose Grade A contours the community of the system is located, in whole or in part;

(3) Third, all television broadcast stations within whose Grade B contours the community of the system is located, in whole or in part;

(4) Fourth, all television translator stations with 100 watts or higher power, licensed to the community of the system.

(c) If the signal of a television broadcast station licensed to a community in a smaller television market is carried by a cable television system, pursuant to § 76.57(a)(4), such signal shall, on request, be afforded network program exclusivity. This provision shall not be applicable to any signal authorized or lawfully carried by a cable television system prior to March 31, 1972.

§ 7693 Extent of Protection.

(a) Where the network programing of a television station is entitled to program exclusivity, the cable television system shall, on request of the station licensee or permittee, refrain from simultaneously duplicating any network program broadcast by such station, if the cable operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. On request of the cable system, such notice shall be given no later than the Monday preceding the calendar week (Sunday–Saturday) during which exclusivity is sought.

(b) Notwithstanding the provisions of paragraph (a) of this section, on request of a television station licensed to a community in the Mountain Standard Time Zone that is not one of the designated communities in the first 50 major television markets a cable television system shall refrain from duplicating any network program broadcast by such station on the same day as its broadcast by the station. Where a cable system is required to provide same-day program exclusivity, the following provisions shall be applicable:

(1) A cable television system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than the programs of two networks (including those broadcast by any stations whose signals are being carried and whose program ex-

clusivity is being protected pursuant to the requirements of this section);

(2) A system need not delete reception of a network program which is scheduled by the network between the hours of 6 and 11 p.m., eastern time, but is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for network programing in the time zone involved.

§ 76.95 Exceptions.

Notwithstanding the requirements of § 76.93:

(a) A cable television system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

(b) The Commission will give full effect to private agreements between operators of cable television systems and local television stations which provide for a type or degree of network exclusivity which differs from the requirements of §§ 76.91 and 76.93.

§ 76.97 Waiver Petitions.

Where a petition for waiver of the provisions of §§ 76.91 and 76.93 is filed within fifteen (15) days after a request for program exclusivity is received by the operator of a cable television system, such system need not provide program exclusivity pending the Commission's ruling on the petition or on the question of temporary relief pending further proceedings.

§ 76.99 Grandfathering.

The provisions of §§ 76.91, 76.93, 76.151, and 76.153 shall not be deemed to deprive a television station whose signal was carried by a cable television system prior to March 31, 1972, of the nonnetwork program exclusivity rights that such station had on March 30, 1972; *Provided, however*, That such exclusivity rights shall extend only to simultaneous duplication of programing by lower priority television stations, unless the station whose exclusivity rights are at issue is entitled to same-day network program exclusivity pursuant to § 76.93(b), in which case that station shall also be entitled to continued same-day nonnetwork program exclusivity.

APPENDIX D

A. PARTIES FILING COMMENTS

Ameco, Inc., American Cable, American Cable Television, Inc.
Blatt Bros TV Cable Corporation, Communications Properties, Inc.
Cotulla Cable TV, Inc., Midwest Cable Television, Inc. (Joint Comments).
American Broadcasting Company.
Association of Maximum Service Telecasters.
Bi-States Company.
Boise Valley Broadcasters, Inc.
Brockway Company.
Cohn and Marks.
Continental Television, Inc.
Jerrold Corporation, National Trans-Video, Inc., Television.
Communications Corporation (Joint Comments).
KLIX Corporation.
KTVB, Inc., KMSO-TV, Inc. (Joint Comments).
Manchester TV Corporation.
National Association of Broadcasters.
National Association of Educational Broadcasters.
National Cable Television Association.
Palmer Broadcasting Company.
Pine Bluffs Community Company.
Pine Bluffs Community Television System.

B. PARTIES FILING REPLY COMMENTS

All-Channel Television Society.
Ameco, Inc., American Cable Television, Inc., Blatt Bros. TV.
Cable Corporation, Communications Properties, Inc. Cotulla Cable.

TV, Inc., Midwest Cable TV, Inc. (Joint Reply Comments).
Association of Maximum Service Telecasters.
KGVO–TV, KCFW–TV, KTVM, KCOY–TV (Joint Reply Comments).
KMSO–TV, Inc.
KTVB, Inc., Bi-States Company, Brockway Company (Joint Reply Comments).
Lee Enterprises, Inc.
National Cable Television Association.
Pine Bluffs Community Television System.
Wheeling Antenna Company, Inc.

FCC 74-304

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of
CAPITOL CABLEVISION CORP., CHARLESTON, DUNBAR, AND SOUTH CHARLESTON, W. VA.
For Certificates of Compliance

CAC-1307 WV104,
CAC-1306 WV105,
CAC-1305 WV107

MEMORANDUM OPINION AND ORDER

(Adopted March 28, 1974; Released April 4, 1974)

BY THE COMMISSION: COMMISSIONER HOOKS DISSENTING.

1. Capitol Cablevision Corp. operates cable television systems in the above-captioned communities located within the Charleston-Huntington, West Virginia major television market (#36).[1] These systems provide subscribers with the following television broadcast signals:

WCHS-TV (CBS, Channel 8) Charleston, West Virginia.
WHTN-TV (ABC, Channel 13) Huntington, West Virginia.
WSAZ-TV (NBC, Channel 3) Huntington, West Virginia.
WMUL-TV (Educ., Channel 33) Huntington, West Virginia.
WOAY-TV (ABC, Channel 4) Beckley, West Virginia.
WSWP-TV (Educ., Channel 9) Grandview, West Virginia.

On September 28, 1972, Capitol filed applications for certificates of compliance to add the signals of the following television broadcast stations:

WKBF-TV (Ind., Channel 61) Cleveland, Ohio.
WUAB (Ind., Channel 43) Lorain, Ohio.
WXIX-TV (Ind., Channel 19) Newport, Kentucky.

Carriage of these signals is consistent with Section 76.61 of the Commission's Rules. Capitol's applications are unopposed.

2. Capitol Cablevision commenced operations in these communities in mid-1968, and, therefore, compliance with our access requirements is not mandatory until March 31, 1977, unless certificates of compliance are granted for the addition of television signals to existing operations. Capitol requests temporary waiver of Section 76.251 (c) of the Rules which requires it to provide one public access channel, one educational access channel, and one local government access channel to each of the three communities it serves, if it receives certificates for carriage of the three additional independent signals.

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[1] Subscriber distribution for the Capitol systems is: Charleston: (population approximately 72,000), 11,300 subscribers; Dunbar: (population approximately 9100), 750 subscribers; and South Charleston: (population approximately 16,500), 2,000 subscribers. The Capitol systems began operation in March of 1968. The systems each currently have 12 channels available for carriage of broadcast and access services. Of these channels, six currently are used for television broadcast signal carriage, one for non-automated program origination, one for automated program origination, and one for all-band FM carriage.

3. Capitol states that its limited channel capacity makes it unable to provide separate access channels to each community. Capitol seeks Commission authorization to provide one public, one educational, and one government access channel for all three systems. This, it alleges, would be adequate to meet local needs until 1977 when the systems will be expanded to 20-channel minimum capacity. In support of its request, Capitol states that the three communities are geographically contiguous and are served from a common headend. The communities of Dunbar and South Charleston are suburbs of Charleston and Capitol's Charleston cablecasting studios are readily accessible. The three communities have common political, economic, social, and local interests. Further, the Dunbar, South Charleston, and Charleston school systems are all under the jurisdiction of the Superintendent of Kanawah County Schools.

4. In adopting our access cablecasting rules for systems in major markets we recognized that they might pose some problems for existing systems operating in smaller communities within these markets. So as not to create undue hardships when other alternatives are available, we have granted temporary waivers of Section 76.251(c) upon a showing that the construction of separate access capability at this time would not be feasible and that subscribers living in the communities will have adequate access cablecasting services. *Gerity Broadcasting Company*, 36 FCC 2d 69 (1972), *Montachusett Cable Television, Inc.*, 43 FCC 2d 445 (1973). We believe that Capitol has adequately demonstrated the need for a waiver of Section 76.251(c) of the Rules.

In view of the foregoing, we find that a grant of the above-captioned applications and temporary waiver of Section 76.251(c) of the Rules would be consistent with the public interest.

Accordingly IT IS ORDERED, That Capitol Cablevision Corporation's applications (CAC–1305, 1306, 1307) ARE GRANTED, and appropriate certificates of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC-74-302

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re
PETITION OF THE CITY OF COLUMBIA, MO.
For Declaratory Ruling

MEMORANDUM OPINION AND ORDER

(Adopted March 28, 1974; Released April 5, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. On November 5, 1973, the City of Columbia, Missouri, petitioned the Commission to issue a declaratory ruling regarding carriage of the following Missouri television broadcast stations by future cable television systems operating in that city: KTVI (ABC), KMOX-TV (CBS), KPLR-TV (Ind.), and KSD-TV (NBC) St. Louis, and KCPT (Educ.) Kansas City.[1] In an earlier but related proceeding, Channel Seventeen, Inc., licensee of Station KCBJ, Columbia, Missouri, filed petitions for special relief opposing carriage of the above signals (SR-37249 and SR-37250). A reply to one of these petitions was filed by International Telemeter of Columbia, Inc., and on June 7, 1972, the Curators of the University of Missouri, licensee of Broadcast Station KOMU-TV, Columbia, Missouri, filed "Comments," opposing carriage of the above signals.

2. This case raises a novel question concerning the effect of Section 76.65 of the Rules[2] on potential franchisees. In 1969, the operators of two proposed cable television systems (International Telemeter of Columbia, Inc., and CATV of Columbia, Inc.) gave proper notice of their intentions to import the above-listed television signals into the Columbia, Missouri, smaller television market pursuant to former Section 74. 1105 of the Commission's Rules.[3] Since no objections to the proposed services were filed within thirty days, both systems were

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[1] Prior to December, 1971, this was Television Broadcast Station KCSD.

[2] Section 76.65 provides that: "The provisions of §§ 76.57, 76.59, 76.61 and 76.63 shall not be deemed to require the deletion of any television broadcast or translator signals which a cable television system was authorized to carry or was lawfully carrying prior to March 31, 1972: provided, however, that if carriage of a signal has been limited by Commission order to discrete areas of a community, any expansion of service will be subject to the appropriate provisions of this subpart. If a cable television system in a community is authorized to carry signals, either by virtue of specific Commission authorization or otherwise, any other cable television system already operating or subsequently commencing operations in the same community may carry the same signals." (Any such new system shall, before instituting service, obtain a certificate of compliance, pursuant to § 76.11.)

[3] § 74.1105 provided in pertinent part: "[n]o CATV system shall commence such operations until thirty (30) days after notice has been given. Such notice shall be given by existing systems which propose to add new distant signals at least thirty (30) days prior to commencing service and by systems which propose to extend lines into another community within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities or where no new local authorization or contractual arrangement is necessary, at least thirty (30) days prior to commencing service."

authorized to begin operating at any time thereafter.[4] Even though both systems were authorized to carry television broadcast signals by the summer of 1969, however, neither system became operational.

3. On February 2, 1972, the Commission adopted the *Cable Television Report and Order*, FCC 72-108, 36 FCC 2d 143. Though Section 76.59 would not permit new cable television systems in Columbia to carry all the signals previously authorized under Section 74.1105, Section 76.65 of the Rules states that:

> The provisions of §§ 76.57, 76.59, 76.61, and 76.63 shall not be deemed to require the deletion of any television broadcast or translator signals which a cable television system was authorized to carry or was lawfully carrying prior to March 31, 1972 . . .

Footnote 58 in the *Cable Television Report and Order*, *supra*, explained that Section 76.65 was intended to include signals which had been "authorized by operation of the provisions of former Section 74.1105 of the Rules and not inconsistent with former Section 74.1107."

4. Station KCBJ-TV notes that it was not given notice of the proposed cable systems and argues that allowing a cable system to operate in a smaller market will harm new local UHF stations, such as it, by fragmenting their audiences and reducing their attractiveness to local advertisers. Both KCBJ-TV and KOMU-TV contend that a valid franchise is a pre-requisite to proper notification pursuant to former Section 74.1105.

5. We reject these arguments. Station KCBJ-TV did not receive its construction permit until July, 1971, and Section 74.1105, therefore, did not require that it be notified in 1969. As for its contention of financial harm, even Station KCBJ-TV notes that "no specific data is available to represent actual financial harm." We therefore find that it has failed to document this argument. Finally, the 1966 regulations did not require a cable television system to obtain a franchise prior to giving notice under former Section 74.1105, and there is no reason to add such a requirement now. International Telemeter has expressed its intention to proceed in building a system as soon as it receives a franchise; if it does, the signals listed previously will be considered grandfathered, and International Telemeter will be allowed to carry them. Under Section 76.65, International Telemeter may carry all signals which were authorized pursuant to former Section 74.1105.

6. In the event that a system is constructed in Columbia by any other party, it also will be permitted to carry these signals. Indeed, in Section 76.65 we expressly provided that:

> If a cable television system in a community is authorized to carry signals, either by virtue of specific Commission authorization or otherwise, any other cable television system already operating or subsequently commencing operations in the same community may carry the same signals.

Since the two prior potential operators had the appropriate "authorization," a cable system "subsequently commencing operations in the same community" would succeed to their rights.

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[4] Three years later, however, in March and June of 1972, objections were filed on behalf of Stations KCBJ-TV and KOMU-TV, both Columbia, Missouri. Although Station KOMU-TV had been given notice in 1969, pursuant to Section 74.1105, Station KCBJ-TV had not, since it did not receive a construction permit until July, 1971. See *David P. Mooney D.B.A. Vicksburg Video, Inc.*, FCC 69-466, 17 FCC 2d 523, 524.

In view of the foregoing, the Commission finds that grant of the petitions for special relief would not be consistent with the public interest. Accordingly, IT IS ORDERED, That the request for declaratory ruling filed by the City of Columbia, Missouri, IS GRANTED to the extent indicated above.

IT IS FURTHER ORDERED, That the "Petition for Special Relief" (SR-37250) filed by Channel Seventeen, Inc., requesting that the Commission order CATV of Columbia, Inc. to stay operation of its proposed cable television system at Columbia, Missouri IS DENIED.

IT IS FURTHER ORDERED, That the "Petition for Special Relief" (SR-37249) filed by Channel Seventeen, Inc. requesting that the Commission order International Telemeter of Columbia, Inc. to stay operation of its proposed cable television system at Columbia, Missouri IS DENIED.

IT IS FURTHER ORDERED, That the "Reply to Petition for Special Relief" filed by International Telemeter of Columbia, Inc. in opposition to the above Petition for Special Relef IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-285

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 0 AND 2 OF THE RULES RELATING TO EQUIPMENT AUTHORIZATION OF RF DEVICES	Docket No. 19356

MEMORANDUM OPINION AND ORDER

(Adopted March 27, 1974; Released April 3, 1974)

BY THE COMMISSION:

1. The Commission has for consideration a request for delay of the effective date of the labelling requirements in the above referenced matter submitted by the Consumer Electronics Group of the Electronics Industries Association (CEG). It should be noted that the request by CEG was submitted as part of a Petition for Reconsideration of the amendment of our rules relating to equipment authorization of RF devices. The history of this proceeding is described in the Report and Order adopting the revised rules (FCC 74-113 released February 15, 1974, 39 F.R. 5912 (February 18, 1974)).

2. CEG requests a postponement of the March 25, 1974 effective date of Section 2.1045 of the revised rules concerning the labelling of equipment. CEG asserts that the switch to the new labels will require expensive retooling and the lead time provided by the Commission is inadequate. Since a longer lead time is necessary, stay of the effective date will be granted for ninety days to include each of the revised rules on the labelling requirements, i.e., 2.925, 2.969, 2.1003 and 2.1045 pending consideration of the petitions for reconsideration of the above entitled rule amendments.

3. IN VIEW OF THE FOREGOING, IT IS ORDERED, THAT the effective date of Sections 2.925, 2.969, 2.1003 and 2.1045 is STAYED until June 25, 1974.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

FCC 74-300

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re FOCUS CABLE OF OAKLAND, INC., OAKLAND, CALIF. Request for Order To Show Cause	CSC-65, CA589

MEMORANDUM OPINION AND ORDER

(Adopted March 28, 1974; Released April 5, 1974)

BY THE COMMISSION: COMMISSIONERS WILEY, CHAIRMAN; REID AND HOOKS CONCURRING IN THE RESULTS.

1. On September 24, 1973, the Community Coalition for Media Change and the Committee for Open Media filed a "Petition fo Clarification, Ruling, and Order to Show Cause" directed against Focus Cable of Oakland, Inc., operator of a cable television system at Oakland, California. Petitioners seek a ruling that Focus' system was not an existing cable television system prior to March 31, 1972, and further ask that the Commission issue an Order to Show Cause why Focus should not cease and desist and/or by enjoined from carriage of broadcast signals over its projected Oakland, California, cable television system, until it has received a Certificate of Compliance pursuant to Sections 76.11(a) [1] and 76.13(a) of the Commission's Rules (Section 76.13(a) describes the information required in an application for Certificate of Compliance). Petitioners rely on the basic claim that Focus constructed a small system solely for the purpose of satisfying the March 31, 1972, effective date of the Commission's new regulations, and that this system had not attained the definitional status of a "cable television system" by the crucial grandfather date.

2. Petitioners contend that construction in the "Skyline" area of Oakland was a contrivance intended to qualify as a cable television system under Section 76.5(a) of the Rules,[2] but was unrelated to and separate from the projected Oakland cable television system. This claim is generally supported by the affidavit of a former Focus manager which states his belief that construction of the Skyline system

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[1] Section 76.11 of the Commission's Rules provides in pertinent part as follows:
"§ 76.11 CERTIFICATE OF COMPLIANCE REQUIRED.
"(a) No cable television system shall commence operations or add a television broadcast signal to existing operations unless it receives a certificate of compliance from the Commission."

[2] Section 76.5(a) of the Commission's Rules provides in pertinent part as follows:
"§ 76.5 DEFINITIONS.
"(a) *Cable television system (or CATV system)*.—Any facility that, in whole or in part, receives directly, or indirectly over the air, and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television or radio stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility that serves fewer than 50 subscribers."

was undertaken ". . . with the intention of reconstructing the Skyline System and connecting its viewers to the regular system to be built later, which would serve all of Oakland." Additionally, petitioners submit date resulting from interviews with several cable subscribers in the Skyline area. The survey indicates that Focus had been providing free service to many persons interviewed. Petitioners cite an August 21, 1973, presentation to the Oakland City Council at which it is alleged Harold R. Farrow, attorney for Focus, stated there would be no charge for service until September 1, 1973, when public access would become available. In view of these allegations,[3] it is argued that Focus had not delivered broadcast signals to fifty or more subscribing members of the public who paid for such service on or before March 31, 1972. Consequently, petitioners argue that Focus was not a "cable television system" by the effective date of the *Cable Television Report and Order;* must submit an application for certificate of compliance; and is not entitled to carry broadcast signals until it receives such a certificate.

3. Focus challenges petitioners' standing on the ground that there is no "nexus" between them and the cable community, and no indication that either petitioning group represents or consists of members of the public residing in Oakland or of "interested parties" within the meaning of Section 76.7 of the Rules.[4] Therefore, Focus argues that petitioners fall short of the guidelines set forth in Office of Communication of the *United Church of Christ* v. *Federal Communications Commission*, 359 F. 2d 994 (D.C. Cir. 1966), and cites *Tele-Vue Systems, Inc.*, 32 FCC 2d 876 (1971) to establish that *United Church of Christ* does not confer standing on all responsible members of the public to act as private attorneys general. Nonetheless, despite its challenge to petitioners' standing, Focus responds to their basic claims.

4. Focus claims it is authorized to carry several broadcast signals by virtue of an unopposed Section 74.1105 notification; that by the end of January, 1972, there were fifty subscribers [5]; and that there are now over seven hundred. Focus admits that initial subscribers in the Skyline area received essentially free service under various billing arrangements, and that some of these arrangements were substantially as detailed by petitioners; however, Focus contends that many systems commence operations with free service during a trial or promotional period. Additionally, Focus argues that its motivation for constructing in the Skyline area is immaterial. Focus challenges petitioners' assertion that fifty paying subscribers were needed by March 31, 1972, for the system to be grandfathered, and contends that petitioners ". . . apply to the situation a jurisdictional section of the Rules (Section

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[3] Additional similar information submitted by petitioners is not discussed herein both because it appears to be cumulative, and because it appears less probative than the listed allegations.

[4] Section 76.7(a) of the Commission's Rules provides that:
"§ 76.7 SPECIAL RELIEF.
"(a) On petition by a cable television system, a franchising authority, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to cable television systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question."

[5] Focus also cites its FCC Form 326–A filed June 29, 1973, which indicates that it had 51 subscribers on March 31, 1972, June 30, 1972, and September 30, 1972, but had fallen to 46 subscribers on December 31, 1972 (for an average of 50 subscribers). Mr. William M. Trust, Jr., sponsored these representations.

76.5) instead of the correct procedural Section (Section 76.11)." Focus explains that Section 76.5(a) is a "carryover" provision from former Section 74.1101(a) adopted in the *Second Report and Order*, 2 FCC 2d 725 (1966), and cites *Meredith-Avco, Inc.*, 16 FCC 2d 689 (1969), and *Service Electric Cable TV, Inc.*, 32 FCC 2d 334 (1971), as decisions holding that a system with fewer than fifty paying subscribers on the grandfather date was nonetheless grandfathered. In addition, Focus cites *Metro Cable Co.*, 39 FCC 2d 169 (1973), and *Universal Cable Vision*, 40 FCC 2d 476 (1973)—cases decided under the present regulations—as further evidence that the Commission has not applied the literal definition of a cable system to its other regulations, and that Section 76.5(a) should not be used to determine when a cable system comes into existence.

5. On November 13, 1973, petitioners filed a "Reply to Opposition and Request for Expedited Treatment" which provides affidavits to show that membership of the petitioning organizations includes residents of Oakland (two were signatories of the initial pleading). In general, petitioners insist that the "audience participation" standard of *United Church of Christ* should be construed broadly in the cable television field since to limit standing to audience members would deny the public an opportunity to participate until cable operations have become entrenched and policies are firmly established. And since cable construction has been "virtually suspended in Oakland," petitioners urge expedited resolution of this matter to minimize the possibility of future public inconvenience. On November 26, 1973, Focus filed a "Response of Focus Cable of Oakland, Inc. to 'Reply to Opposition and Request for Expedited Treatment' " which reargues its earlier position. On December 6, 1973, petitioners filed a "Motion to Strike Response to Focus Cable of Oakland, Inc." on the ground that it is an additional pleading not contemplated by our rules. In view of the unusual circumstances of this proceeding (i.e., that this arises as a result of a request for an Order to Show Cause), however, we will deny petitioners' request and consider the pleading.

6. To the extent that petitioners accuse Focus of overt violation of our rules, it is farfetched even to raise an issue of standing: clearly our interest in the enforcement of the rules transcends this technical issue. Nonetheless—if only to assure that every pleading filed in routine cable television cases is not henceforth captioned "Order to Show Cause" to evade a standing requirement—we will comment briefly on the issue. The Commission has granted standing in broadcast matters to representatives of a station's listening and viewing audience, and a similar policy is recognized for cable television. (see footnote 4). The role of "private attorneys general" in the area of cable television is at least as important as that required by the regulation of broadcast media since cable audiences have a direct economic interest over and above the purchase of receiving equipment described in *United Chuch of Christ*. The cable consumers make additional monetary outlays in the form of installation charges and monthly service fees which reinforce their standing in an administrative action. While recognizing that the public should be afforded standing in cable matters, we do not wish to limit our recognition only to those subscribing residents of the relevant franchise area for—were this our position—a large segment of the

community (especially during the initial periods of cable penetration) would be precluded from participation in vital decisions concerning local cable television service. And once connected, the subscriber may be dependent on the system both for local and distant signals. In these circumstances, we intend to construe "interested person" in Section 76.7 of the Rules as broadly as reasonably possible. Nonetheless, we caution that we do not propose to tolerate bootstrap arguments whereby the filing of a pleading is sufficient to establish a party as an interested person. It may well be that ultimately we will have to refine the scope of the standing concept in different types of cable television cases (certification, enforcement, etc.). We will, however, defer further explication for subsequent cases where the issue may be more squarely raised.

7. Evidence submitted by petitioners and respondent clearly established that Focus began distributing television broadcast signals in January, 1972, consistent with the procedures of our former cable television rules. Pursuant to former Section 74.1105 of those rules, Focus notified interested parties of its intent to begin service, and when no objections were interposed service commenced with a number of local signals. What remains for our determination is whether petitioners have presented evidence sufficient to place in doubt Focus' status as an existing cable system on the critical date of March 31, 1972: whether, in point of fact, Focus was a grandfathered cable system as of that date and therefore exempted from filing an application for a certificate of compliance pursuant to § 76.11(a). Our examination of the pleadings and supporting affidavits compels the conclusion that petitioners have failed to support their assertions with anything like persuasive proof. The affidavits of former managers of the Focus system do not touch upon the issue of the number of subscribers the system had attained by March 31, 1972. Petitioners interviewed 12 persons; of these, 7 received Focus service. Apparently two paid for the service; one received it on a trial basis for which no fee was paid; two served as "monitors"—receiving monthly checks from Focus which they endorsed and returned to the company; two persons received free service. Focus submitted the affidavits of two subscribers who indicated they paid for it. As indicated above,[6] Focus referred to its filing of FCC Form 326–A with the Commission, revealing that it had 50 subscribers on March 31, 1972. Since Focus relied on its Form 326–A for corroboration of its subscriber count, we believe it appropriate to state that it has been examined by the Commission's staff and no misstatement of its contents appears to have been made. We do not find petitioners' threshold factual allegations have placed in question Focus' status as a grandfathered cable system as of March 31, 1972.[7] Consequently, no hearing on this matter is necessary. Moreover, even if we shared petitioners' view of the facts, the failure to have 50 paying subscribers by March 31, 1972, is not decisive of the grandfathering

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[6] See Footnote 5.

[7] In this respect, this matter differs from our recent decisions denying grandfather rights to other erstwhile cable systems. Our ruling in *Southern Illinois Cable TV Co.*, FCC 73–1274, 44 FCC 2d 460, turned on the fact that no fees were charged subscribers on March 31, 1972, or later. In *California Antenna T–V, Inc.*, FCC 74——, —— FCC 2d ——, the applicant provided free service to viewers as a means of avoiding a mandatory stay of cable operations triggered by the objection of a local television station.

issue. In *Meredith-Avco, Inc.*, 7 FCC 2d 601 (1967), we accorded grandfather status to a system which did not assess a charge to its subscribers on the critical date in that case. (The matter was placed in hearing when our factual findings were questioned (10 FCC 2d 126 (1967)) and we later described the grandfathering issue as a "close one" (16 FCC 2d 689, at 698 (1969)), under the modified facts. But this did not affect our ruling of law in the earlier case.) In *Service Electric Cable TV, Inc.*, 32 FCC 2d 334 (1971), a system was grandfathered which served only 25 subscribers on the critical date. Our decision turned on the following consideration:

> The primary public interest objective of the grandfather provisions was to avoid the disruption of an existing situation by withdrawing from CATV subscribers a signal which they were then receiving, and we do not deem it to be a matter of decisional significance that the supplier of the signal was serving less than the number of subscribers specified in Section 74.1101(a) on the February 15, 1966, date. The determinative factors, in our view, are that a CATV facility, whether or not in all respects a CATV system within the contemplation of Section 74.1101(a), was delivering the signals in question to a significant number of subscribers on the critical date.[8]

Grandfathering the Focus cable system on the facts found above therefore does not "subvert policies we deem essential to the public interest."[9]

In view of the foregoing, the Commission finds that issuance of the requested Order to Show Cause would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Clarification, Ruling, and Order to Show Cause" (CSC-65) filed September 24, 1973, by Community Coalition for Media Change and Committee for Open Media, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

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[8] *Service Electric Cable TV, Inc.*, FCC 71-1145, 32 FCC 2d 334 at 349.

[9] Cf. *Southern Illinois Cable TV Co.*, FCC 73-1274, 44 FCC 2d 460 at 464.

FCC 74-312

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF GARDEN OF THE GODS BROADCASTING CO., RADIO STATION KEDI, MANITOU SPRINGS, COLO.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted March 28, 1974; Released April 4, 1974)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Memorandum Opinion and Order adopted on October 25, 1973 issued to Garden of the Gods Broadcasting Company, licensee of Radio Station KEDI, Manitou Springs, Colorado and (2) the licensee's application for mitigation or remission of the forfeiture dated November 30, 1973, filed pursuant to Section 1.621 of the Commission's Rules and Section 504(b) of the Communications Act of 1934, as amended.

2. The Memorandum Opinion and Order of October 25, 1973 imposed a forfeiture on the licensee in the amount of five hundred dollars ($500) for violation of Section 1304, Title 18, U.S. Code, by broadcasting information concerning a lottery.

3. Licensee bases its application for mitigation or remission on inexperienced interim management (although it acknowledges that this fact "is certainly no excuse"), severe financial hardship in operating the station, and lack of intent to defraud.

4. The three elements required for a finding pursuant to Section 1304, Title 18, U.S. Code that a lottery exists are prize, chance, and consideration. *Federal Communications Commission* v. *American Broadcasting, Inc.*, 347 U.S. 284 (1954). In our Memorandum Opinion and Order of October 25, 1973, we found that all three elements of a lottery were present in the KEDI-Pizza Hut Promotion, and licensee has furnished no information which would cause us to alter that finding. Considering all of the circumstances in this case, including the licensee's financial condition, we are not persuaded to remit or mitigate the forfeiture.

5. Accordingly, IT IS ORDERED, That the application for mitigation or remission dated November 30, 1973 of the Garden of the Gods Broadcasting Company, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-287

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of the Petition of
HEINS TELEPHONE CO.
For Waiver of Section 64.601 of the Commission's Rules To Permit It To Acquire the Assets of Lee Cable-Vision, Co., Inc., d.b.a. Cablevision of Sanford, and Operate a Cable Television System in Sanford, N.C., and Environs;
and
Application for Certification, Under Section 214(a) of the Communications Act of 1934, as Amended, and Pursuant to Section 63.505 of the Commission's Rules To Discontinue Cable Television Channel Service, an Interstate Common Carrier Service Offering Pursuant to Its Tariff FCC No. 1 in the Community of Sanford, N.C.

File No. W-602-37

File No. P-D-357

MEMORANDUM OPINION, ORDER, AND CERTIFICATE

(Adopted March 28, 1974; Released April 1, 1974)

BY THE COMMISSION:

1. The Commission has before it for consideration the above-captioned petition submitted by Heins Telephone Company of Sanford, North Carolina (Applicant), requesting a waiver of Section 64.601[1] of the Commission's Rules to permit it to acquire the assets of Lee Cable-Vision Co., Inc. (Cablevision of Sanford)[2] and operate a community antenna television system in Sanford, North Carolina, and environs. Heins Telephone Company's proposed cable television operations will be performed by a wholly owned subsidiary corporation, Central Carolina Cablevision, Inc. and the charter for this corporation was granted by the Secretary of the State of North Carolina on January 28, 1974.

2. Applicant further requests in the above-captioned application, submitted pursuant to Section 214(a) of the Communications Act and

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[1] Section 64.601 provides, in part, that "No telephone common carrier subject in whole or in part to the Communications Act of 1934, as amended, shall directly or indirectly through an affiliate owned or controlled by or under common control with said telephone communications common carrier, engage in the furnishing of CATV service to the viewing public in its telephone service area."

[2] American Television & Communications Corporation (ATC) through its subsidiary American Cablevision of Carolina, Inc. is the parent corporation of Lee Cable-Vision Company, Inc., dba Cablevision of Sanford. FCC Form 325 filed August 6, 1973, lists James E. Heins, President of Heins Telephone Company, and three other residents of Sanford as having stock ownership of 5% each in Lee Cable-Vision Co., Inc.

Section 63.505 of the Commission's Rules, certification that neither the present nor future public convenience and necessity will be adversely affected by its discontinuance of cable television channel service in the community of Sanford, North Carolina, and environs in Lee County.

3. Public notice that the application and petition for waiver of Section 64.601 had been accepted for filing was given on January 8, 1974 (Common Carrier Service Report No. W–99, Mimeo No. 16209). A copy of the application and petition was served on the Secretary of Defense, the Governor of North Carolina, Sanford Cable Corporation, American Cablevision of Carolina, Inc. and the American Television & Communications Corporation. No opposition was received against a grant of the petition for waiver and the application for discontinuance of cable television channel service. No formal pleadings were received within the time specified for responsive pleadings, nor has any request been made for extension of such time.

4. Applicant currently provides cable television channel service to Cablevision pursuant to its Tariff F.C.C. No. 1, which was filed on August 12, 1968. On May 1, 1970, the Commission granted Applicant a temporary waiver of Sections 63.54 and 64.601 for the construction and operation of proposed facilities and for continued operation of existing facilities as described in its application (File No. P–C–7198) for the rendition of cable television channel service to Lee Cable-Vision Co., Inc. Since Mr. James E. Heins, President of Heins Telephone Company, owns shares in Lee Cable-Vision Co., Inc., that operates in the telephone company service area, an affiliation exists within the meaning of Section 64.601 of the Commission's Rules. The temporary waiver was granted subject to the provision that Heins Telephone Company comply fully with the provisions of Section 63.56 of the Commission's Rules not later than March 16, 1974.

5. Applicant states that the current operating outlook of Cablevision of Sanford is bleak; and that its present owners report that it has a negative net worth of some $150,000, debt to its parent of some $335,000, and a negative cash flow. To reach a breakeven point on current operations alone (even before debt service), Cablevision of Sanford, according to its present owners, would have to gain another 910 subscribers, bringing the total subscriber count to some 1,452, equal to about 66% penetration of the 2,200 homes presently passed by the cable system in the Sanford areas.

6. Applicant contends that even with the additional signals allowed under the new cable television rules,[3] it is highly doubtful that Cablevision of Sanford will ever achieve the 66% penetration of the Sanford area necessary to make the operation break even. Applicant states that the addition of distant signals to attract more subscribers would require additional investment in plant; but such investment is highly unlikely at a time when breakeven calculations are based on the assumption that the cable system is incapable of paying its debts.

7. Applicant states that the financial data set forth above indicate that Cablevision of Sanford is too small to be economically viable,

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[3] Cablevision of Sanford operates a 12-channel cable television system, carrying signals of such stations as Channel 11, WTVD (CBS–NBC), Durham; Channel 5, WRAL–TV (ABC), Raleigh; Channel 4, WUNC–TV (educational), Chapel Hill; Channel 2, WFMY (CBS), Greensboro; and Channel 8, WGHP–TV (ABC), High Point.

even when operated by ATC (one of the largest multiple-system cable television corporations in the nation), and that Cablevision's financial prospects do not indicate much hope for a change in the future. Applicant states that the only way Cablevision of Sanford can survive is to combine operations with the telephone company in order to achieve certain economies of scale which can only be offered by joint operation of the cable television system and the telephone company.

8. ATC states that several cable television system entrepreneurs refused to pursue any possibility of purchasing Cablevision of Sanford for the financial reasons set forth; and that there was not even enough potential interest among prospective purchasers to warrant the expense of an advertising campaign designed to solicit new owners. ATC's offers to sell have been rejected outright or have been unanswered.[4] ATC contends that it is satisfied that there are no prospective purchasers or operators for Cablevision of Sanford other than Heins Telephone Company, which may be able to achieve economies of scale in combining telephone and cable television service, thus making the latter feasible. ATC believes that acquisition of the assets of Cablevision and the operation of a cable television system by Heins Telephone Company is the only viable alternative to guarantee that the City of Sanford will continue to be provided with cable television service. ATC urges the Commission to grant the necessary waiver of Section 64.601 so that the citizens of Sanford will not be deprived of cable television service.

9. Applicant states that it offered to sell the facilities by which it provides cable television channel service in the Sanford area to ATC for replacement cost less depreciation, but ATC was unwilling to meet these terms. On November 14, 1973, the stockholders of Lee Cable-Vision, Inc., finding no reasonable alternatives, agreed to terminate service in the Sanford area and to surrender the company's franchise. Applicant then extended its current limited offer to assume the assets of Cablevision of Sanford and to operate a cable television system in the Sanford area if the Federal Communications Commission grants the necessary waiver of Section 64.601 of its Rules.

10. On January 28, 1974, the City of Sanford authorized the transfer of the cable television franchise from Lee Cable-Vision Co., a subsidiary of ATC, to Central Carolina Cablevision, Inc., a newly created wholly owned subsidiary of Heins Telephone Company. This transfer was approved by the City of Sanford to prevent the City from losing its cable television service. The City is satisfied that there are no pro-

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[4] Included with the application is a copy of a letter from Triangle Broadcasting Company, dated December 4, 1973, directed to Cablevision of the Carolinas, Inc., stating that "it is our belief that Sanford is not and would not be in the foreseeable future an economically viable system for Triangle Broadcasting. The system is simply too small to be economically feasible to a company such as Triangle." (Since the only cable television service in the Sanford area is provided by Cablevision of Sanford, it appears that the above mentioned letter was intended for American Cablevision of Carolina, Inc.)

A letter dated December 10, 1973, to American Cablevision of Carolina, Inc. from Electra Communications, Inc. states that: "After a careful review of this property, I am sorry to advise that my company, Electra Communications, Inc., cannot make you an offer for this property. We cannot find any valid reason to believe that this system can ever be owned and operated by an 'out of town' corporation. Neither the system or the potential homes to be served can justify the expense of a manager, technician or any management expenses whatsoever. Even if you sold us the system for $1.00 (one dollar) we would not be interested as we could not justify the operating losses or any capital expenditures that may be required to provide the citizens of Sanford with an efficient operating cable television system."

spective purchasers or operators other than Heins Telephone Company for what is a failing cable television system. The City of Sanford states that acquisition and operation of the system by Applicant is the only viable alternative to guarantee that the City of Sanford will continue to be provided with cable television service, and urges the Commission to grant the necessary waiver of Section 64.601 so that the citizens of Sanford will not be deprived of cable television service.

11. Applicant has agreed to assume the burden of operating a cable television system on the assumption that petitioning this Commission for the necessary waiver will prove to be neither time consuming nor burdensome financially. Applicant states that should it acquire the assets of Cablevision, it will do its best to see that current cable service is continued in Sanford at present levels. Applicant also states that it recognizes that it must maintain separate accounting books for both the cable system and the telephone company to ensure that telephone ratepayers will not cross-subsidize the cable operations if the economies of scale from joint operation of a cable system and the telephone company do not prove successful in eliminating all losses in the initial phases of joint operation.

12. Applicant states that no other purchaser is willing to step forward to assume the burdens of operating an essentially failing cable television system, and therefore it requests the necessary authority to acquire the assets of Cablevision of Sanford and operation of a cable television system in order to guarantee continued cable television service in the Sanford area.

Discussion

13. Section 64.602 of our Rules provides, in part, that "In those communities where CATV service demonstrably could not exist except through a CATV system related to or affiliated with the local telephone common carrier or upon other showing of good cause, the provisions of Section 64.601 may be waived, on the Commission's own motion or on petition for waiver, if the Commission finds that public interest, convenience and necessity would be served thereby."

14. In our *Memorandum Opinion and Order* released July 10, 1973 denying the petition for rulemaking, File No. RM 2172, FCC 73–717, of Denver and Ephrata Telephone and Telegraph Company, *et al.*, we stated that no application for waiver will be granted unless supported by a satisfactory showing, with appropriate documentation of the efforts made by applicant to divest itself of ownership and control of its cable television service, and that its failure to come into compliance with the divestiture requirement is not due to any dereliction on its part in exploring and pursuing alternative arrangements.

15. On the basis of the information submitted in the application and petition, we believe that cable television service cannot continue to survive at this time in Sanford except through a cable television system affiliated with the Heins Telephone Company. We find that Applicant and ATC have made a satisfactory showing with appropriate documentation of efforts to sell Cablevision of Sanford to other entrepreneurs. We also find that the present public convenience and necessity require a grant of the petition for waiver of Section 64.601

of our Rules, since this appears to be the only presently viable alternative to cessation of cable television service in Sanford. In order to prevent the acquisition of the assets of Cablevision of Sanford and operation of a cable television system by the telephone company from being subsidized by, or from burdening, other common carrier services, we will require that Applicant maintain books of account for the cable television subsidiary separate from any books of account maintained for the telephone company.

16. Discontinuance of cable television channel service is requested in the above-captioned application (File No. P–D–357) as presently provided under Applicant's Tariff F.C.C. No. 1, as Applicant proposes to sell the cable facilities to its subsidiary, and will therefore no longer be providing the service.[5]

17. Since the cable television channel service is neither necessary nor required to satisfy any existing or anticipated demand, and since present cable television service by Cablevision of Sanford (the present entrepreneur) to subscribers in the service area will be continued by a cable television system operated by Heins Telephone Company, it appears that neither the present nor future public convenience and necessity will be adversely affected by grant of authority for discontinuance of cable television channel service as provided by Applicant in Sanford, North Carolina. We are conditioning grant of authority for discontinuance of cable television channel service by requiring that if the subsidiary cable television corporation proposes to purchase the cable facilities from Heins Telephone Company, that such a sale be treated for accounting purposes as if it were a sale of plant with telephone traffic associated therewith, and accounted for pursuant to the requirements of Section 31.2–25(g) of our Rules.

ORDER AND CERTIFICATE

IT APPEARING, That acquisition of the assets of Lee Cable-Vision Company (Cablevision of Sanford) and operation of a cable television system in the Sanford, North Carolina area by Central Carolina Cablevision, Inc., a subsidiary of Heins Telephone Company, is the only presently viable alternative to the cessation of cable television service in that area;

IT FURTHER APPEARING, That retail cable television service to subscribers in Sanford, North Carolina, and environs, will continue to be furnished without interruption by a new affiliate of Heins Telephone Company, namely, Central Carolina Cablevision, Inc.;

IT IS ORDERED, That petition (W–602–37) for waiver be GRANTED FOR A PERIOD OF TWO YEARS (at which time Petitioner may request a further waiver if it believes the facts justify such a request), SUBJECT TO THE CONDITION that Heins Telephone Company shall maintain books of account for the cable television subsidiary separate from any books of account maintained for the telephone company to prevent any acquisition of the assets of Cablevision of Sanford, and the operation of a cable television system from being subsidized by, or from burdening, common carrier services.

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[5] Applicant represents that a pole-attachment agreement will executed.

IT IS HEREBY CERTIFIED, That neither the present nor future public convenience and necessity will be adversely affected by the proposed discontinuance of cable television channel service (a common carrier service offering provided under Tariff F.C.C. No. 1) by Heins Telephone Company in the community of Sanford, North Carolina and environs.

Accordingly, IT IS ORDERED, That application (File No. P–D–357) IS GRANTED, and that Heins Telephone Company IS HEREBY AUTHORIZED to discontinue cable television channel service in the community of Sanford, North Carolina, and environs SUBJECT TO THE CONDITION that accounting with respect to sale of cable facilities by Heins Telephone Company to its subsidiary shall be in accordance with the Uniform System of Accounts prescribed by the Commission, and in particular, with Section 31.2–25(g) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

FCC 74-314

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
THADDEUS L. KOWALSKI, ESQ., AND ANTI-DEFAMATION COMMISSION OF THE POLISH AMERICAN CONGRESS, INC.; AGAINST AMERICAN BROADCASTING COS., INC.

MEMORANDUM OPINION AND ORDER

(Adopted March 28, 1974; Released April 3, 1974)

BY THE COMMISSION: CHAIRMAN WILEY ABSTAINING FROM VOTING.

1. The Commission has before it an Application for Review of the Broadcast Bureau's ruling of September 26, 1973, filed October 29, 1973 by Thaddeus L. Kowalski, in his individual capacity, and on behalf of the Anti-Defamation Commission of the Polish American Congress, Inc. (hereinafter Petitioners). Also before the Commission are an Opposition to the Application for Review filed on November 14, 1973 by American Broadcasting Companies, Inc. (ABC); and Petitioner's reply to said opposition, filed December 3, 1973.

2. In their June 28, 1973 complaint, Petitioners alleged that ABC violated the Commission's personal attack rule during the August 10, 1972 broadcast of the Dick Cavett Show by attacking "the character, intelligence, hygiene or appearance of members of the Polish American community" by means of so-called "Polack jokes." Petitioners further alleged that the controversial issue of public importance involved was the "demeaning and defamatory attacks in the guise of ethnic 'humor'." Petitioners also claimed that ABC violated the fairness doctrine by failing to present in its overall programming "opposing views on the issue of defamation of Polish Americans." Specifically, Petitioners contended that the "Polack jokes" broadcast on the Dick Cavett Show disseminate the "dumb polack image, i.e., lack of intelligence, lack of personal hygiene, comic apparel and obnoxious features."

3. We have examined the pleadings herein and believe that the Bureau's ruling was correct for the reasons stated therein. However, we believe that certain matters raised in the instant case merit some comment.

4. No matter how much it may disagree with a certain matter, the Commission is prohibited, under Section 326 of the Communications Act from censoring broadcast material or from promulgating any regulation which would interfere with freedom of expression by broadcasting. With the exception of appearances by legally qualified candidates for public office and other matters specifically covered by statute, the Commission does not intervene in the selection of particular

program material, nor may it either prohibit or compel the broadcast of any particular program. *National Citizens Committee for Broadcasting*, 42 FCC 2d 1060 (1973). As the Commission has stated:

> It is the judgment of the Commission, as it has been the judgment of those who drafted our Constitution and of the overwhelming majority of our legislators and judges over the years, that the public interest is best served by permitting the expression of any views that do not involve "a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance or unrest." *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942); *Ashton* v. *Kentucky*, [384 U.S. 195], 34 L.W. 4398 (1966). This most assuredly does not mean that those who uphold this principle approve of the opinions that are expressed under its protection. On the contrary, this principle insures that the most diverse and opposing opinions will be expressed, many of which may be even highly offensive to those officials who thus protect the rights of others to free speech. If there is to be free speech, it must be free for speech that we abhor and hate as well as for speech that we find tolerable or congenial. *Anti-Defamation League of B'nai B'rith*, 4 FCC 2d 190, 191–2 (1966).

5. We agree with the Bureau's ruling that ABC was not unreasonable in concluding that the broadcast of the jokes herein and attendant remarks did not constitute the discussion of a controversy of public importance. Consequently, neither the fairness doctrine nor the personal attack rule may be applied in the instant case. Regarding the personal attack rule, it applies only where an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group during the presentation of views on a controversial issue of public importance. 47 C.F.R. § 73.679. See *Fairness Primer*, 29 Fed. Reg. 10415, 10420 (1964). Even if a controversial issue of public importance was involved in the matter about which petitioners complained, the personal attack rule would not apply to the language here cited. The text and prior application of the personal attack rule clearly indicate that the operation of the rule was to be predicated upon an attack on those personal qualities bearing on the moral rectitude or personal credibility of a named individual or group. *Rome Hospital and Murphy Memorial Hospital*, 40 FCC 2d 452, 453 (1973).

6. For the foregoing reasons, pursuant to Section 1.115(i) of the Commission's Rules and Regulations, the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74–204

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
LOGANSPORT TV CABLE CO., LOGANSPORT, IND. (IN029)	CAC–2559
GREATER LAFAYETTE TV CABLE CO., LAFAYETTE (IN022), WEST LAFAYETTE, IND. (IN023)	CAC–2564, CAC–2565
MARION CABLE TV, INC., MARION (IN032), GAS CITY (IN030), JONESBORO (IN031), GRANT COUNTY, IND. (IN107)	CAC–2560, CAC–2563, CAC–2562, CAC–2561
TELECABLE OF KOKOMO, INC., KOKOMO (IN045), HOWARD COUNTY, IND. (IN069)	CAC–2566, CAC–2567
HOOSIER TELECABLE, WABASH (IN004), PERU (IN003), GRISSOM AFB (IN070), MIAMI COUNTY, IND. (IN071)	CAC–2552, CAC–2568, CAC–2569 CAC–2570
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted February 27, 1974; Released April 5, 1974)

BY THE COMMISSION: COMMISSIONER WILEY CONCURRING IN THE RESULT.

1. In *Video Service Company*, 40 FCC 2d 480, *recons. denied*, FCC 73–1209, —— FCC 2d —— (1973), the Commission granted special temporary authorization for ten of the above-referenced cable television systems to substitute carriage of Chicago, Illinois Station WSNS–TV (Ind., Channel 44) for Station WFLD–TV (Ind., Channel 32), also Chicago, during WSNS–TV's broadcasts of the Chicago White Sox baseball games.[1] This temporary authorization was expressly conditioned upon the filing of applications for certificates of compliance for full carriage of Station WSNS–TV. On May 17, 1973, eleven of the subject systems filed for such substitute carriage.[2] The applications of Marion Cable Television, Inc. (Marion), for Marion, Grant County, and Gas City, Indiana, are opposed by Indiana Broadcasting Corporation (Indiana), licensee of Stations WANE–TV, Fort Wayne, Indiana, and WISH–TV, Indianapolis, Indiana.[3] Field Communications Corporation (Field), licensee of Station WFLD–TV, Chicago, Illinois, has filed oppositions to all of the above applica-

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[1] The cable systems located at West Lafayette, Howard County, and Miami County were not involved in that proceeding.

[2] The applications of Telecable of Kokomo for Kokomo (CAC–2566) and Howard County (CAC–2567), also filed on May 17, 1973, seek to add WSNS–TV without deleting WELD–TV. These systems are located outside all major and smaller television markets, and, therefore, carriage of WSNS–TV is consistent with Section 76.57 of the Rules.

[3] Indiana also opposed Hoosier Cable Television's application for Wabash, Peru, Grissom Air Force Base, and Miami County, Indiana. These objections have been withdrawn.

tions. Video 44, licensee of Station WSNS–TV, Chicago, Illinois, has filed comments on Field's and Indiana's objections.

2. All of the systems commenced service prior to 1972 and provide their subscribers with Station WFLD–TV.[4] Wabash, Marion, Grant County, and Gas City are within the Fort Wayne-Roanoke, Indiana, major television market (#82). Lafayette and West Lafayette are within the Lafayette, Indiana smaller television market, and the remaining seven systems (Logansport, Jonesboro, Kokomo, Howard County, Peru, Grissom AFB, and Miami County) appear to be outside of all markets.

3. In its opposition to the applications, Field argues that it would be more equitable to limit the carriage of Station WSNS–TV to those times when the Chicago White Sox games are broadcast. To permit the complete substitution of Station WSNS–TV for Station WFLD–TV, Field argues, would put too much emphasis on a seasonal entertainment feature, while overlooking the totality of Station WFLD–TV's programming and disrupting viewing habits. Both Field and Indiana argue that the *Dubuque* case (*Dubuque TV–FM Cable Co.*, 40 FCC 2d 393 (1973)), where such a substitution was permitted, is distinguishable, since it involved an unopposed application. They further argue that the applicants here have neither requested a waiver nor presented justification for a waiver of the Commission's Rules to permit carriage of Station WSNS–TV. Indiana also argues that, pursuant to *Cable TV of York*, 40 FCC 2d 927 (1973), the existing number of grandfathered signals is relevant if a system in a second fifty major television market seeks to add a new independent signal in accordance with the bonus provision of Section 76.63(a) of the Rules. That rule provides that systems in the second fifty major television markets are limited to two bonus independents. Hence, Indiana argues that the Marion systems which carry, at present, four independents, only one of which is authorized as a non-bonus signal,[5] should be required to drop two signals in order to add WSNS–TV. Finally, Indiana argues that Marion's applications are deficient because they fail to provide for additional access channels as required by Section 76.251(c) of the Rules.[6]

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[4] All of the above systems have 12 channel capacity. The dates for the commencement of operations, number of subscribers, and population of communities are as follows:

System	Population	Number of subscribers	Date of commencement of operations
Logansport	19,256	7,391	December 1963.
Lafayette	45,214	11,315	March 1963.
West Lafayette	19,157	3,399	March 1963.
Marion	40,253	9,876	May 1966.
Gas City	5,745	1,134	February 1967.
Jonesboro	2.487	467	October 1967.
Grant County	N.A.	N.A.	May 1966.
Kokomo	44,042	8,053	August 1970.
Wabash	13,252	3,309	April 1964.
Howard County	83,198	2,427	August 1970.
Peru	13,987	4,244	April 1964.
Grissom AFB	6,000	1,280	March 1966.
Miami County	2,000	505	April 1967.

[5] WTTV (Ind., Channel 4), Bloomington, Indiana, is "significantly viewed" in Grant County, Indiana.

[6] Section 76.251(c) provides in pertinent part: [I]f such systems receive certificates of compliance to add television signals to their operations . . . [prior to March 31, 1977.] pursuant to Section 76.61(b) or (c), or 76.63(a) (as it relates to 76.61(b) or (c)), for each such signal added, such systems shall provide one (1) access channel. . . ."

4. We reject the arguments made by Field and Indiana. With respect to those cable systems operating outside of all markets, Section 76.57 (b) provides that in addition to those stations that must be carried upon request, a system may "carry any additional television signals." Section 76.65, which "grandfathers" pre-March 31, 1972 carriage of such additional television signals, does not confer upon those stations any right to carriage on the cable system. Hence, Stations WFLD–TV, which is not a "must-carry" signal, cannot assert any right to carriage. With respect to cable systems operating within smaller television markets, the Commission has twice previously recognized the public interest importance of the continued carriage of Chicago White Sox games.[7] Most recently, in waiving the provisions of Section 76.59, *sua sponte*, and permitting the substitution of WSNS–TV for WFLD–TV, the Commission stated, referring to the previous waiver:[8]

> [T]he continued availability of Chicago White Sox games for Dubuque cable television subscribers was an important factor in our determination that good cause existed. We believe the same considerations compel a waiver of our smaller market signal carriage rules; certainly no useful purpose will be served if the applicant's subscribers are denied programming which the system has been at such pains to provide.

We should emphasize that what we are deciding today is not that programming, or the number of independent signals which a system carries, may be grandfathered. Rather, we are permitting a waiver of our carriage rules based upon previously recognized considerations of public interest. *A fortiori* the same public interest considerations are applicable to those systems operating in a second fifty major market. And Field and Indiana have not presented any arguments that warrant departure from our previous judgment. Finally, the mere substitution of one channel for another does not trigger the access channel requirements of Section 76.251, because what is involved is a substitution, not an addition of signals. We have imposed the access channel requirements on any system "which receives the benefits of additional signal carriage as a result of our new rules".[9] A system that substitutes signals, and does not thereby increase the total number of signals carried, cannot be said to be in that "growth" situation to which our access channel rules are directed.[10]

In view of the foregoing, the Commission finds that a grant of the subject applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Objection of Indiana Broadcasting Corp. Pursuant to Section 76.27" filed June 25, 1973, by Indiana Broadcasting Corporation and the "Response of Field Communications Corporation to Applications for Certificate of Compliance" filed June 25, 1973, by Field Communications Corporation ARE DENIED.

IT IS FURTHER ORDERED, That the applications for certificates of compliance filed by Logansport TV Cable Company for Logansport, Indiana (CAC–2559), Greater Lafayette TV Cable Company for Lafayette (CAC–2564) and West Lafayette (CAC–2565), Indiana, Marion Cable TV Inc. for Marion (CAC–2560), Gas City (CAC–2563), Jonesboro (CAC–2562), and Grant County (CAC–2561), Indiana, Telecable of Kokomo for Kokomo (CAC–2566) and Howard County (CAC–2567), Indiana, and Hoosier Telecable for Wabash (CAC–2552), Peru (CAC–2568), Grissom AFB (CAC–2569), and Miami County (CAC–2570), Indiana ARE GRANTED and appropriate certificates of compliance will be issued.

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[7] *Dubuque TV–FM Cable Co.*, 40 FCC 2d 393 (1973), and *Dubuque TV–FM Cable Co.*, 18 FCC 2d 25 (1969).

[8] 40 FCC 2d 393, 394 (1973).

[9] *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 358, 359 (1972).

[10] *Cable Television Report and Order*, 36 FCC 2d 197 (1972).

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-292

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 81—TO ESTABLISH A SCHEDULED DATE FOR THE CONVERSION OF MARINE FIXED- AND MARINE RECEIVER-TEST STATIONS FROM DOUBLE SIDEBAND TO SINGLE SIDEBAND RADIOTELEPHONY	Docket No. 19862

ORDER

(PROCEEDING TERMINATED)

(Adopted March 28, 1974; Released April 2, 1974)

BY THE COMMISSION:

1. The Commission released its Notice of Proposed Rule Making in the instant proceeding on November 19, 1973, which was published in the Federal Register on November 26, 1973 (38 F.R. 32518). The date for filing comments and reply comments has passed.

2. No comments or reply comments were filed in response to the Notice of Proposed Rule Making. In the absence of such comments, and for the reasons set forth in the Notice of Proposed Rulemaking, the Commission is adopting without change the proposed amendments to Sections 81.132(a)(3) and 81.134(e), which are set forth in the attached Appendix.

3. Accordingly, IT IS ORDERED, That pursuant to the authority contained in Sections 303 (f), (g) and (r) of the Communications Act of 1934, as amended, Part 81 of the Commission's rules, IS AMENDED, effective May 14, 1974, as set forth in the attached Appendix.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

APPENDIX

Part 81 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows: "Part 81. Stations on Land in the Maritime Services and Alaska-Public Fixed Stations."

1. In Section 81.132, subparagraph (a) (3) is amended to read as follows:

"§ 81.132 AUTHORIZED CLASSES OF EMISSION.

"(a) * * *

"(3) Marine fixed and marine receiver-test stations: 2000–2850 kHz, except for 2182 kHz: A3A and A3J; [1] 2182 kHz: A3 and A3H.

"[1] Emissions A3 and A3H may continue to be employed until July 1, 1975. These emissions will not be available for use after that date.

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2. In Section 81.134, paragraph (e) is amended to read as follows:

"§ 81.134 TRANSMITTER POWER.

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"(e) For marine fixed and marine receiver-test stations, transmitter power shall not exceed 150 watts for A3,[1] A3A, A3H,[1] and A3J emissions and 50 watts for F3 emission.

"[1] Effective July 1, 1975, emission A3 will not be available and emission A3H is available for use on 2182 kHz only.

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FCC 74-294

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
NEW YORK TELEPHONE CO., TARIFF FCC NO. 37, FILED NOVEMBER 12, 1973, OFFERING LOCAL DISTRIBUTION FACILITIES FOR USE BY OTHER CARRIERS

MEMORANDUM OPINION AND ORDER

(Adopted March 28, 1974; Released April 2, 1974)

BY THE COMMISSION: COMMISSIONERS WILEY, CHAIRMAN, AND REID CONCURRING IN THE RESULT.

1. Before us are the following pleadings submitted by ITT World Communications, Inc. (ITT), Western Union International, Inc. (WUI), and RCA Global Communications, Inc. (RCA): (a) a telegraphic "Petition for Stay and Reconsideration" filed February 19, 1974 by ITT;[1] (b) a telegraphic "Petition for Stay and Reconsideration" filed February 15, 1974 by WUI;[1] (c) a formal "Petition For Reconsideration" filed February 21, 1974 by WUI; (d) a formal "Petition for Suspension" filed March 6, 1974 by ITT; (e) a formal "Petition For a Stay" filed March 11, 1974 by ITT; (f) a formal "Petition to Suspend Tariff" filed March 6, 1974 by WUI; (g) a formal "Petition to Reject Tariff" filed March 6, 1974 by WUI;[2] and (h) a formal "Petition For Declaratory Ruling, or in the Alternative, Suspension" filed March 6, 1974 by RCA.

2. These formal pleadings seek in essence to have us re-examine and modify or reverse certain actions we have twice taken with respect to FCC Tariff No. 37 filed by the New York Telephone Company (NYT). This tariff was originally filed on November 12, 1973 to become effective February 24, 1974. It consisted of an offering by NYT to provide local distribution facilities to other communication carriers, including WUI, ITT and RCA. It was filed in purported compliance with two orders and directives by the Commission: namely the order contained in our grant of domestic satellite authorizations to American Telephone and Telegraph Company (AT&T) on September 12, 1973 (42 FCC 2d 654) and our letter order of October 4, 1973 to AT&T.

3. The first action by the Commission which WUI, ITT and RCA now seek to modify or reverse was taken by us on January 9, 1974 wherein we denied numerous petitions filed by entities other than petitioners to suspend the effectiveness of the NYT Tariff FCC No. 37,

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[1] No consideration is being given to these telegraphic pleadings. *See* 47 C.F.R. 1.44(e).

[2] In the interest of expedition we are acting on this petition herein although normally such petition would be acted on by the staff under delegated authority.

among others.[3] We stated at that time that "to suspend the effectiveness of the tariffs or to reject them at this time would be somewhat inconsistant with our conclusion that such tariffs are required to be filed with us in order to achieve compliance with Section 203 of the Act and our own decisions and orders"; and that "suspension of the tariffs or rejection now could deprive certain carriers of interconnection facilities who wish to obtain such facilities under such tariffs and could result in undue discrimination and preference among different customers."

4. The second action sought to be reversed or modified by petitioners was taken by us on February 13, 1974 in which we denied the petitions of these WUI and ITT carriers to reject or suspend NYT Tariff FCC No. 37.[4] The principal argument made at that time was that the tariff as originally filed contained no specific dollars and cents rates but merely made cross-reference to a local intrastate tariff on file with the New York State Public Service Commission. Such cross-reference was in violation of Part 61 of our rules (Section 61.74). Consequently the staff granted NYT a waiver of the rules to permit the carrier to file immediately, on not less than 30 days' notice, corrective revisions to the tariffs. Such corrective revisions, containing dollars and cents rates, as our rules require, were filed on February 11, 1974 on more than 30 days' notice and this removed the principal objection of petitioners at that time. Thereafter, NYT Tariff FCC No. 37, as originally filed, became effective on February 24, 1974.

5. The present pleadings of WUI, ITT and RCA are addressed specifically to the aforementioned corrective revisions to NYT Tariff FCC No. 37. These revisions are now scheduled to become effective March 30, 1974, to replace the cross-reference to a state tariff that is not allowed under our rules. Petitioners, having failed to obtain suspension or rejection of the original Tariff FCC No. 37, are now seeking to have the corrective tariff revisions suspended, stayed or rejected and not be allowed to become effective.

6. Petitioners' principal contentions in this current round of pleadings are (a) that NYT's Tariff FCC No. 37 offers only voice grade distribution facilities to other carriers, including WUI, ITT and RCA, whereas NYT has for years been providing telegraph grade facilities to such carriers under informal contracts at lower rates than apply to voice grade facilities and the result is that petitioners will now be required to pay substantially higher amounts under the NYT Tariff FCC No. 37 for such local distribution facilities; and (b) that by not offering telegraph grade rates in FCC Tariff No. 37, NYT is proposing to discontinue telegraph grade local distribution service to petitioners in violation of Section 214 of the Act.

7. We must reject petitioners' contentions. Petitioners are asking us, in effect, to reverse our fundamental ruling that local distribution facilities furnished by the Bell System Companies to other carriers for interstate or foreign communications, as in the case of WUI, ITT and RCA, must be furnished only under effective tariffs on file with this Commission. The only exception we have allowed to date is in the case of the exchange of facilities contracts in effect between the Bell

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[3] *In the Matter of Bell System Tariffs re Entrance,* et al., FCC 74-36, Released January 11, 1974.

[4] *In the Matter of New York Telephone Company Tariff FCC No. 37,* FCC 74-148, Released February 19, 1974.

System and The Western Union Telegraph Company which contracts have been filed with us. Petitioners would have us suspend or stay the rates in NYT's tariff and either permit or require rates to be charged that are not in any tariffs on file with us, and would instead have us allow rates to be applied that have been used in alleged informal oral contracts between NYT and petitioners, none of which contracts have ever been filed with this Commission, nor has the Commission ever been informed as to the specific terms and conditions of such contracts.[5] This would be a clear violation of Section 203 of the Act and our rules, orders and directives thereunder. We decline to take such action. Under the terms of Section 203(c) of the Act the only effect of a suspension or stay of the revised tariff would be that neither WUI, nor ITT nor RCA would be able to obtain any local distribution facilities service from NYT since Section 203(c) forbids the furnishing of such interstate or foreign communications services or facilities without filing with us tariffs containing charges therefor. Such discontinuance of service would not be in the best interest of petitioners or the public.

8. As to the Section 214 contention of petitioners, we think it is clear that NYT is not discontinuing any service to a community or part of community by publishing the dollars and cents rates in its tariff as our rules and Section 203 of the Act require. Petitioners will continue to obtain local distribution facilities and service on and after March 30, 1974, as in the past, and they will continue to be able to serve their own customers through the use of such local distribution facilities and service as in the past. However, petitioners will be paying more for such service than they now pay under alleged oral contracts that have never been filed with the Commission. This increase in charges does not constitute a violation of Section 214. The objectives of Section 214 could be defeated if we were to suspend or reject the revised tariff as petitioners request, for NYT would then be required under Section 203 of the Act to discontinue local distribution service to petitioners as well as all other carriers.

9. For the foregoing reasons we are of the opinion that we should allow the corrective revisions to become effective on March 30, 1974 without suspension or rejection and without approval or disapproval by us, but subject to further proceedings we expect to hold in due course on the lawfulness of all of the Bell System tariffs offering interconnection facilities to other carriers. In this connection we shall treat the petitions of WUI, ITT and RCA as timely filed complaints under Section 208 of the Act and we will expect NYT to keep such records as are necessary to make appropriate refunds with interest in the event that we shall find in further proceedings that the rates charged on and after March 30, 1974 under NYT Tariff FCC No. 37 are unjust, unreasonable or otherwise unlawful.

10. In view of the foregoing, IT IS ORDERED, That the formal petitions referred to in paragraph 1 above ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

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[5] A substantial question is raised, which we do not address at this time, as to whether the failure to file these contracts, or the substance thereof, with us is a violation of the Act. (*See* 47 U.S.C. 211(a) and Section 43.51 of our Rules.)

FCC 74-310

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF SUBPART B (FM BROADCAST STATIONS) OF PART 73 IN CERTAIN RESPECTS } Docket No. 19987

NOTICE OF PROPOSED RULEMAKING

(Adopted March 28, 1974; Released April 3, 1974)

BY THE COMMISSION:

1. Notice of Proposed Rule Making is given concerning the assignment and use of noncommercial educational FM channels in portions of Arizona, California, New Mexico, Texas, and adjacent areas.

2. The United States-Mexico FM Broadcasting Agreement (Agreement), which went into effect August 9, 1973, concerns the allotment and use of FM broadcast channels within 199 miles (320 kilometers) of the common border (border area). To eliminate harmful interference between the FM broadcasting stations of the respective countries, the Agreement provides a scheme of mileage separations as between classes of channels in most respects identic with those set forth in Part 73, Subpart B of our Rules and Regulations as concerns the assignment and use of commercial channels (221–300) in the United States. Since Mexico makes full use of the FM spectrum (88 to 108 MHz) for commercial use, it was necessary to include within the Allotment Plan (Annex II of the Agreement) channels which in the United States are reserved for noncommercial educational use (201–220). Except for Channels 218, 219, and 220 which are variously adjacent to commercial Channels 221, 222, and 223, interference for the educational channels is determined on a contour interference basis (see § 1.573).

3. It would appear that the public interest, convenience, and necessity would be served if rules and regulations are adopted to assure that the allotment of educational channels be fully protected and there be the same flexibility of use as § 73.203 permits for commercial FM channels. It also would appear appropriate that provision be made for the assignment of additional noncommercial educational channels to the border area. In this respect, we propose to amend § 73.507 added to our Rules and Regulations, effective October 17, 1973 (43 F.C.C. 2d 293, 298, 299) as set forth in the attached Appendix. We also propose to provide Class A, B, and C assignments and authorizations with the same mileage protection from noncommercial educational Class D stations as set forth in the Agreement. When these amendments are adopted, appropriate editorial changes to the Notes to §§ 73.207 and 73.504, promulgated by Order, FCC 74–309, adopted today implementing the Agreement, will be made.

4. Accordingly, under the authority found in §§ 4(i), 303 (g) and (r) of the Communications Act of 1934, as amended, it is proposed that the Commission's Rules and Regulations be amended as set forth in the attached Appendix.

5. Pursuant to applicable procedures set out in Section 1.415 of the Commission's Rules and Regulations, interested parties may file comments on or before May 14, 1974, and reply comments on or before May 23, 1974. All submissions by parties to this proceeding or persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings.

6. In accordance with the provisions of Section 1.419 of the Commission's Rules and Regulations, an original and fourteen copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

7. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C. (1919 M Street, N.W.).

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

APPENDIX

1. Amend § 73.507 by adding paragraphs (b), (c), and (d) to read as follows:

"§ 73.507 NONCOMMERCIAL EDUCATIONAL CHANNEL ASSIGNMENTS UNDER THE UNITED STATES-MEXICO FM BROADCASTING AGREEMENT.

* * * * * * *

"(b) Anyone applying for a noncommercial educational FM station other than on a Class D channel in the border area of Arizona, California, New Mexico, or Texas must apply for a channel set forth in the table in paragraph (a) for use either at the listed community or an unlisted community under the same conditions set forth in § 73.203(b) of this chapter.

"(c) The minimum mileage separations set forth in § 73.207 of this chapter and the Note thereto shall apply to (i) a petition for rule making to amend the table set forth in paragraph (a) and (ii) an application for any class of noncommercial educational FM channel (new station, change in channel of an existing station, or change in location or facility of an existing station), whether within or outside the border area referred to in paragraph (a). Any petition to amend which so conflicts will be dismissed. Any application which does not so conform will not be accepted for filing.

"(d) § 73.208 of this chapter will be complied with as to the determination of reference points and distance computations in considering petitions to amend the table set forth in paragraph (a) and for applications for new or changed facilities. However, if it is necessary to consider a Mexican channel assignment or authorization, the computation of distance will be determined as follows: if a transmitter site has been established, on the basis of the coordinates of that site; if a transmitter site has not been established, on the basis of the reference coordinates of the community, town, or city."

FCC 74-306

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
PHOENIX BROADCASTING CO. (KPHX),
PHOENIX, ARIZ.
Has: 1480 kHz, 500 W, Day
Requests: 1480 kHz, 1 kW, Day
For Construction Permit

File No. BP-19518

MEMORANDUM OPINION AND ORDER

(Adopted March 28, 1974; Released April 5, 1974)

BY THE COMMISSION:

1. The Commission has before it for consideration the above-captioned application and a petition to deny filed by Dwight-Karma Broadcasting Company, licensee of stations KDBK-AM and KDBK-FM, Phoenix, Arizona.

2. In support of its proposal, KPHX submitted field intensity measurements made on its existing operation on eight radials (0°, 45°, 90°, 135°, 180°, 225°, 270° and 315°) to determine the extent of its 5 mV/m contour. Utilizing these data, the extent of the KPHX 5 mV/m contour was depicted by using a smooth transition from each measured radial to the next. On this basis, KPHX concludes that its present 5 mV/m contour covers only 72 percent of Phoenix and that it is eligible for a power increase under the provisions of section 73.37 (e)(3)(ii).[1]

3. On January 28, 1974, Dwight-Karma Broadcasting Company petitioned to deny the KPHX proposal on the grounds that the present operation of KPHX covers "approximately" 80 percent of Phoenix and that KPHX is thus ineligible for a power increase. In support of the petition, petitioner alleges that the eight measured radials submitted by KPHX are insufficient to define the extent of the present KPHX 5 mV/m contour. It is contended that significant terrain irregularities exist in the area involved and that additional radials would be required to define the extent of the existing KPHX 5 mV/m coverage of Phoenix. It is also alleged that the measurements made by the applicant on the 180° radial from KPHX are not sufficiently complete for an accurate determination of the location of the existing 5 mV/m contour along that radial. In opposition, the applicant states that the cog-wheel[2] type showing made by petitioner to establish the

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[1] This section of the rules provides that an existing station is eligible for a power increase if it can be demonstrated that the 5 mV/m contour of the existing operation covers less than 80 percent of the area or population of the community to which the station is assigned.

[2] In determining the extent of the KPHX existing 5 mV/m contour, petitioner assumed that the measured extent of the contour was valid for a 10° arc on either side of the measured radial, but beyond a 10° swing the contour was abruptly drawn in to join the 5 mV/m contour depicted from values of conductivity indicated by Figure M-3 of the Commission's rules. As previously indicated, KPHX plotted the 5 mV/m contour by using a smooth transition from each measured radial to the next.

extent of the existing KPHX 5 mV/m contour is not logical and defies the laws of nature. It is also contended by KPHX that the charge of insufficient measurements on the 180° radial is without foundation.

4. With regard to the 5 mV/m coverage question involved, we first note that the coverage exhibit (Figure A) submitted by KDKB in its petition is deficient since it does not depict the city boundaries of Phoenix. Without a showing of city boundaries, it is not possible, of course, to determine the percentage of the city which is covered by the existing 5 mV/m contour. However, in order to permit a comparison between the showings by the two parties, we have drawn in the city boundaries of Phoenix (as shown by the applicant) on the exhibit Figure A submitted by petitioner. On this basis and assuming *arguendo* that the extent of the existing KPHX 5 mV/m contour as depicted by petitioner is correct, we find that the present KPHX coverage of Phoenix is 80.95 percent. It is apparent, therefore, that if the "cog-wheel" type showing of the KPHX 5 mV/m contour as depicted by petitioner were modified only slightly, that is, if instead of abruptly changing the extent of the KPHX 5 mV/m contour from the measured radials (including 10° swing on either side of each measured radial), only a slight blending were used, the present 5 mV/m coverage would be less than 80 percent and compliance with 73.37(e)(3)(ii) would be achieved.

5. We have studied the field intensity measurement data submitted by the applicant, including the 180° radial, and we find that the data are in reasonable accordance with the provisions of section 73.186 of the rules. Moreover, while the measurements indicate some variation in effective conductivity over the paths measured, the variations are not so great that the abrupt changes in the extent of the KPHX 5 mV/m contour as depicted by petitioner could be expected to occur. A careful study of a large-scale topographic map also indicates that abrupt conductivity changes from the measured values should not occur. We conclude, therefore, that the KPHX data are adequate to demonstrate that the existing KPHX 5 mV/m contour covers less than 80 percent of Phoenix and that compliance with section 73.37(e)(3)(ii) is achieved.

6. In view of the foregoing, we find that there are no substantial or material questions of fact to bar a grant of the application or which warrant designating this application for hearing. The Commission further finds that the applicant is qualified to construct and operate as proposed and that grant of the application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the petition to deny filed by Dwight-Karma Broadcasting Company IS DENIED and the above-captioned application to increase power IS GRANTED subject to the terms and conditions to be specified in the construction permit.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-315

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

AMENDMENT OF PART 76, SUBPART G, OF THE COMMISSION'S RULES AND REGULATIONS RELATIVE TO PROGRAM ORIGINATION BY CABLE TELEVISION SYSTEMS; AND INQUIRY INTO THE DEVELOPMENT OF CABLECASTING SERVICES TO FORMULATE REGULATORY POLICY AND RULEMAKING	Docket No. 19988

NOTICE OF PROPOSED RULEMAKING AND OF INQUIRY

(Adopted March 28, 1974; Released April 3, 1974)

BY THE COMMISSION:

1. Notice is hereby given of proposed rule making and of inquiry in the above-entitled matter concerning the mandatory origination requirement of Section 76.201 of our Rules and Regulations. Persons interested in commenting on the matters discussed herein are referred to the Commission's *First Report and Order in Docket No. 18397* (20 FCC 2d 201, 34 Fed. Reg. 17651, released October 27, 1969) for discussion of certain of the policies and of the background pertaining to this notice. See also *Reconsideration of the First Report and Order* (23 FCC 2d 825).

2. The Commission first proposed required cable origination channels in its *Notice of Proposed Rule Making and Notice of Inquiry* issued December 13, 1968, (15 FCC 2d 417, 33 Fed. Reg. 19028) Docket No. 18397. In the *First Report and Order in Docket No. 18397*, *supra*, the Commission adopted mandatory origination rules designed to become effective January 1, 1971. The rules applied to all systems having 3,500 or more subscribers. No systems were grandfathered. Requirements were imposed similar to those of Sections 315 and 317 of the Communications Act with respect to equal opportunities for political candidates, fairness in the treatment of controversial issues of public importance, and sponsorship identification provisions were made applicable to cablecasting. The rules also authorized advertising on cablecasts.

3. In discussing our action (Paragraphs 19 and 20), we stated that we felt mandatory origination would stimulate origination by systems which would not otherwise do so, and thus create more local programming. Further, we felt that the origination requirement would help to ensure that technical equipment and facilities would be available for use by others wishing to originate on leased channels. We noted that small communities might derive the greatest benefit from local origination but acknowledged the prohibitive costs which might be associated with such a requirement. The financial information supplied

by the responses to the Notice indicated that a basic monochrome system for cablecasting could be obtained and operated for an approximate annual cost of $21,000 and a color system for about $56,000. The financial information was highly speculative, however, and we acknowledged that information was lacking and that our decision on the 3,500 figure was somewhat tentative (Para. 20).

4. In discussing the parameters of the cablecasting requirement, we made clear that automated services (time, weather scan—news teletype) were not considered local origination for purposes of the new rule. We said the operator must . . . "operate to a significant extent as a local outlet by originating. . . .," and added that this requirement would in essence necessitate that the CATV operator have some kind of video cablecasting system for the production of local, live and delayed programming.

5. On July 1, 1970, we released our *Reconsideration of the First Report and Order, supra.* We therein noted that some parties argued that the uncertainties inherent in the origination rules, as to cost, impact, possible changes in the rules, copyright ambiguities, and state public utility regulations were grounds for not making the rules mandatory. There was no argument that our stated policy of promoting multi-purpose CATV operation combining the carriage of broadcast signals, program origination, and common carrier (access) services was not in the public interest. Rather, it was urged that mandatory origination would not further that goal. We there rejected such argument, saying there was no evidence that systems of over 3,500 subscribers could not cablecast without impairing their financial stability, raising rates, or reducing the quality of service. We did, however, on our own motion, postpone the effective date of the rules to April 1, 1971. (In our *Reconsideration,* we also added rules against pay-cable siphoning, lotteries, and the monopolization of origination equipment that would prevent the operator from producing local programming.)

6. On July 28, 1970, Midwest Video Corporation filed with the United States Court of Appeals for the Eighth Circuit a petition for review of the mandatory origination rules. On December 15, 1970, Midwest filed with the Commission a "Motion for Stay" of the rules. Midwest argued before the Court that the Commission lacked jurisdiction to require origination. It stated to the Commission that a stay should be granted to avoid irreparable injury should it have to go to the expense of securing origination equipment only to then prevail in Court.

7. We denied Midwest's requested stay but, in light of new showings by the National and California Cable Television Associations regarding the potentially damaging costs of origination for systems of less than 10,000 (ultimate) subscribers, instituted waiver procedures for such systems. We stated: ". . . we see no public benefit in risking injury to CATV systems in providing local origination. Accordingly, if CATV operators with fewer than 10,000 subscribers request *ad hoc* waiver of (the rules), they will not be required to originate pending action on their waiver requests." Systems with more than 10,000 subscribers could also request waivers but they would not be excused from compliance until the waiver was granted. (27 FCC 2d 778).

8. On May 13, 1971, the United States Court of Appeals for the Eighth Circuit held in *Midwest Video* v. *U.S.*, 441 F. 2d 1322, that the Commission lacked authority to impose the program origination rule on existing cable television operators. The Court said that the scope of regulatory power defined by the Supreme Court in *U.S.* v. *Southwestern Cable Co.*, 392 U.S. 157, did not extend to requiring a cable operator to engage in an entirely new business, one which would be costly, and in many cases, outside the expertise of the operator.

9. The Commission subsequently announced by public notice (FCC 71-577) the suspension of the mandatory origination rules ". . . pending the outcome of further judicial review. . . ." By that date approximately 200 waivers of the rules had already been requested and about 70 time extensions had been granted. The waiver petitions were dismissed as moot because of the suspension of the rule.

10. The Supreme Court, in *U.S.* v. *Midwest Video Corp.*, 406 U.S. 649 (June 7, 1972), reversed the Eighth Circuit opinion. The Court stated that the rule is within the Commission's statutory authority to regulate CATV at least to the extent "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." Four justices joined in the Court decision with the Chief Justice concurring. Four justices dissented. Despite the Court's action affirming our authority to require originations, we have not chosen to terminate the stay (see 39 FCC 2d 377, at footnote 2).

11. The reason we have not terminated our stay order is the same as that which prompted the instant rule making proceeding—i.e., we question whether our requirement of mandatory origination for all systems with over 3,500 subscribers is of continuing validity in light of experience and events since the promulgation of the rule. Our original requirement for mandatory origination was made in October of 1969 at a time when the cable television industry as a whole had had little experience with locally originated programming. Our action then was, of necessity, based upon certain assumptions concerning the economic aspects of local originations and accompanied by optimistic hopes for its future.

12. One very important area where the intervening time period has reflected changed conditions is that of the practical experience of the cable industry obtained from now having engaged in sustained local origination. According to recent estimates, some 800 systems currently engage in non-automated program originations. We are informed, both formally and informally, that this practical work experience has demonstrated a marked, upward trend in origination costs from those upon which our earlier action was predicted. These costs relate to all aspects of origination—equipment costs, replacement parts, extensive repair and maintenance costs. For example, it appears that our original estimates of equipment costs were low. Recent estimates for a small monochrome facility run from $25,000 to $40,000 and for full color facilities from $60,000 to $200,000 excluding operating expenses, which also are significantly on the increase. (Cable Television Information Center Document "The Uses of Cable Communication" 1973.) Moreover, it appears that actual experience in local originations by and large has not shown the hoped-for audience and advertiser support.

Admittedly, audience data figures in this area are lacking, but there are serious complaints from within the cable television industry that despite local commitment in terms of programming creativity and accompanying expenditures, it still is taking an extended period to attract viewers and advertisers to local community programming. We would like to point out, however, that in spite of these adverse conditions, we are aware of the admirable programming accomplishments of certain cable systems, large and small, throughout the country. Examples of such programming are summarized in the 1973 "NCTA Cablecasting Guide."

13. Perhaps an even more significant development in the interim period has been the adoption of the Commission's "access" rules (Section 76.251 *et seq.*) in our February 1972, *Cable Television Report and Order.* The addition of public, educational, and governmental access channels and ancillary equipment may well have a significant bearing upon whether it should remain necessary to require the cable system to originate local programming. With the "access" interests originating "local" programming on three separate channels, and with the additional possibility that users of leased channels might also originate certain "local" programming, our goal of localism in cable originations might best be met through these channels rather than through the mandatory origination channel.

14. Lastly, equitable considerations have been raised as to whether it is appropriate for us—albeit acknowledging our right to do so—to force a cable system into local program origination. For example, the dissenting opinion in the Supreme Court *Midwest* decision, *supra*, objected to the concept of a cable system operator being "drafted against his will to become a broadcaster. . . ." This argument is particularly appropriate with respect to older, classic "reception service" cable systems which often show little interest in originations and whose end product often reflects such reluctance. Conversely, the emerging, major market cable systems undoubtedly would voluntarily enter originations because their very existence often will depend upon their ability to deliver new programming to subscribers.

15. It is important to note that nothing herein should be inferred as a lessening of our desire to foster local cable originations and to have available origination equipment with which to do so. On the contrary, after several years of practical experience, we reaffirm these goals. Our objective in this rule making is simply to question the means of achieving such goals. We intend by this Notice of Proposed Rule Making and of Inquiry to invite all interested parties to comment on a thorough review of the existing mandatory program origination requirements of Section 76.201. During the pendency of this proceeding our origination rules, insofar as they concern the fairness doctrine, equal time, lotteries, advertising, etc. §§ 76.205–221, will remain in full force and effect. Moreover, we continue to adhere to our belief that local program origination requirements as well as local origination regulations inconsistent with federal policy are preempted, 20 FCC 2d 201, 223 (1969).

16. In view of the foregoing, the Commission invites all interested parties to submit comment on or related to the following questions:

(1) Has the program origination requirement satisfied the purpose it was established for as stated in the *First Report and Order in* Docket 18397?

(2) Should the requirement be amended, modified, eliminated or altered in any way?

(3) Should the triggering factor for the rule be raised to 5,000 subscribers? 10,000?

(4) Are there any other formulae that could equitably be developed to trigger an origination requirement if one is considered valuable?

(5) Should the present rule or a modified one include a grandfather provision for systems in operation prior to the initial development of the rule?

(6) Should compliance with the Commission's access rules be considered a complete or partial substitute for the origination requirement regardless of system size?

(7) Should regulatory emphasis be placed on access channels and allow origination to develop on a purely voluntary basis?

(8) What has the industry experience been in the field of local origination vis-a-vis costs of equipment, maintenance and repair, and manpower expenses?

(9) What has the industry experience been in the areas of audience and advertising revenues to support locally originated programming?

(10) In the event mandatory originations are deleted, should larger cable operators nevertheless be required to make available equipment for third parties, access users as well as leased channel users?

17. Authority for the rule making proposed herein is contained in Sections 4(i), 303, and 403 of the Communications Act of 1934, as amended. All interested parties are invited to file written comments on this rule making proposal on or before May 14, 1974, and reply comments on or before May 23, 1974. In reaching a decision in this matter, the Commission may take into account any other relevant information before it, in addition to the comments invited by this Notice.

18. In accordance with the provisions of Section 1.419 of the Commission's Rules and Regulations, an original and 14 copies of all comments, replies, pleadings, briefs, or other documents filed in this proceeding shall be furnished to the Commission. Responses will be available for public inspection during regular business hours in the Commission Public Reference Room at its Headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC-74-298

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of SARATOGA CABLE TV CO., INC., SARATOGA SPRINGS, N.Y. For Certificate of Compliance	CAC-3459 NY397

MEMORANDUM OPINION AND ORDER

(Adopted March 28, 1974; Released April 4, 1974)

BY THE COMMISSION:

1. On December 28, 1973, Saratoga Cable TV Company, Inc., filed the above-captioned application to substitute the distant independent signals of Television Broadcast Stations WOR-TV and WPIX, both New York, New York, for the previously authorized carriage of the distant independent signals of Stations WKBG-TV, Cambridge, Massachusetts, and WHCT-TV, Hartford, Connecticut on its cable television system at Saratoga Springs, New York. Saratoga Springs (pop. 18,590) is a community located in the Albany-Schenectady-Troy television market (#34). This application is unopposed.

2. The following review of prior Commission action is helpful in evaluating Saratoga Cable TV's present request. On June 22, 1972, Saratoga Cable TV filed an application for certificate of compliance (CAC-722) in which it proposed to operate a new cable television system at Saratoga Springs, New York. Saratoga Cable TV requested, in addition to the distant independent signal of WSBK-TV, Boston, Massachusetts, a waiver of the "leapfrogging" provisions of Section 76.61(b)(2) of the Commission's Rules to import the distant independent signals of Television Broadcast Stations WOR-TV and WPIX, both New York, New York. The applications were opposed by Albany Television, Inc., licensee of Television Broadcast Station WTEN, Albany, New York, and by Sonderling Broadcasting Corporation, licensee of Station WAST, Albany, New York. In addition, Faith Center, licensee of Station WHCT-TV, Hartford, Connecticut, filed a "Petition for Carriage." Thereafter, Saratoga Cable TV amended its application to request also carriage of a fourth distant independent signal, WHCT-TV.

3. On February 7, 1973, in *Saratoga Cable TV Co., Inc.*, FCC 73-148, 39 FCC 2d 611 (1973), the Commission denied carriage of WOR-TV and WPIX and authorized carriage of the following television broadcast stations:

WAST (ABC, Channel 13) Albany, New York.
WTEN (CBS, Channel 10) Albany, New York.
WRGB (NBC, Channel 6) Schenectady, New York.
WMHT (Educ., Channel 17) Schenectady, New York.

WSBK–TV (Ind., Channel 38) Boston, Massachusetts.
WHCT–TV (Ind., Channel 18) Hartford, Connecticut.

and one UHF independent station located within 200 air miles of Saratoga Springs, which Saratoga Cable TV might select. A certificate of compliance was to be issued when Saratoga Cable TV advised the Commission of its choice. On March 30, 1973, Saratoga Cable TV advised the Commission of its choice of Station WKBG–TV (Channel 56), Cambridge, Massachusetts, as its additional UHF signal. Subsequently, the appropriate certificate of compliance was issued. On November 9, 1973, in *Commission on Cable Television of the State of New York*, FCC 73–1148, 43 FCC 2d 826 (1973), *recons. denied*, FCC 74–99, —— FCC 2d —— (1974), the Commission granted special relief to allow cable television systems in the "Capital District" (the communities within the Commission's definition of the Albany-Schenectady-Troy television market) to carry two independent television signals (WOR–TV and WPIX) from New York City, notwithstanding the leapfrogging restrictions of Section 76.61(b)(2) of the Rules, on condition that the affected cable television systems "refrain from deleting news and public affairs programs of the New York City stations pursuant to the provisions of Section 76.61(b)(2)(ii)." In addition, the Commission stated that its decision was dispositive of leapfrog issues in the Capital District and objections on these grounds would not be dealt with in the certificating process.[1]

4. In support of its present request, Saratoga Cable TV states that pursuant to the Commission's decision in *Commission on Cable Television*, the Cable Television Bureau has been issuing certificates of compliance to other cable systems in the Capital District, which authorize the carriage of Stations WOR–TV and WPIX. The applicant or WHCT–TV on its system since preparation for microwave service to deliver these two signals was held in abeyance pending the outcome of the New York State petition for special relief. Thus, the proposed substitution for these two signals will not cause a disruption of established viewing patterns. Saratoga Cable TV argues that while it was previously denied authority to carry WOR–TV and WPIX, in view of the Commission's recent actions, it is now fully entitled to carry the two stations and WSBK–TV in Saratoga Springs.[2] We must agree *Capitol District Better T.V., Inc.*, FCC 74–199, —— FCC 2d —— (1974).

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the application for certificate of compliance (CAC–3459), filed by Saratoga Cable TV Company, Inc., IS GRANTED, subject to the condition expressed in paragraph 3 above, and the appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

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[1] *Commission on Cable Television, supra*, at 833, n. 17.

[2] WSBK–TV, Boston, Massachusetts, is a UHF independent television station located within 200 air miles of Saratoga Springs.

FCC 74-311

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF SPRINGFIELD TELEVISION BROADCASTING CORP., LICENSEE OF TELEVISION STATION WRLP, GREENFIELD, MASS.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted March 28, 1974; Released April 4, 1974)

BY THE COMMISSION: COMMISSIONERS WILEY, CHAIRMAN; AND ROBERT E. LEE CONCURRING IN THE RESULT.

1. The Commission has under consideration (1) its Memorandum Opinion and Order adopted July 26, 1973, addressed to Springfield Television Broadcasting Corporation, licensee of Television Station WRLP, Greenfield, Massachusetts, assessing a forfeiture of $1,000 for failure to make and log daily frequency checks as required by Sections 73.672(a)(3)(i) and 73.690(a) of the Rules and (2) the licensee's Petition for Reconsideration dated September 4, 1973.

2. In the Petition for Reconsideration licensee admitted that the violations had occurred, but stated that the licensee had not been aware of the requirement, that monthly checks had been made, and that corrective action had been taken. These factors were considered in adopting the Memorandum Opinion and Order on July 26, 1973, and their restatement does not persuade us to alter our determination.

3. Licensee also urged, in support of its Petition for Reconsideration, that the forfeiture be totally remitted or substantially reduced because of subsequent amendments to the Rules.[1] Licensee stated:

> While the Commission was considering the imposition of a forfeiture on Springfield TV, for violation of Sections 73.672(a)(3)(i) and 73.690(a), it was also considering changing and modifying these very same rules. On March 26, 1973, the Commission released its Notice of Proposed Rule Making in Docket No. 19712 (FCC 73-322) looking toward amending the Commission's Rules to, among other matters, delete the requirements for making frequency monitor readings every three hours and making daily frequency checks for television station carrier frequencies. On August 8, 1973, only one week after the Commission imposed the forfeiture on Springfield TV for violation of Sections 73.672(a)(3)(i) and 73.690(a), the Commission issued its Report and Order in

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[1] At the time of the violations Section 73.690(a) provided as follows: "The visual carrier frequency and the difference between the visual carrier frequency and the center frequency of the aural transmitter shall be checked as often as necessary to ensure that they are kept at all times within the prescribed tolerance. At least one such check shall be made each day." Section 73.690(a) was amended effective November 21, 1973 by a Report and Order adopted August 8, 1973 and provided as follows: "The visual carrier frequency and the difference between the visual carrier frequency and the center frequency of the aural transmitter shall be measured as often as necessary to ensure that they are maintained within the prescribed tolerance. However, in no event shall the interval between successive measurements exceed 31 days." This section was amended again to provide for measurements once every calendar month but with not more than 40 days expiring between successive measurements.

> Docket No. 19712 (FCC 73-861) eliminating these requirements. In so doing, the Commission noted that frequency stability in television transmitters is no longer a significant problem and is "certainly not one which warrants requiring that frequency be continuously monitored."
>
> Thus, Springfield TV is now being required to pay a forfeiture of $1,000 for violation of a Rule which, in effect, no longer exists and which the Commission, after careful consideration and retrospection, found not to be necessary or warranted. In view of this action, the Commission's adherence to its Order imposing a $1,000 forfeiture on Springfield TV would not only be unduly harsh but unfair. This would seem to be particularly so since Springfield TV in explaining its failure to make the frequency readings and log entries, which are no longer required, submitted to the Commission the reports of Cambridge Crystals indicating the stability of WRLP's transmitter; a stability which the Commission found to be a significant factor warranting the deletion of these requirements from Sections 73.672(a)(3)(i) and 73.690(a).

4. In this regard, we have held that licensees must comply with the rules which are in force at the time, and they will not be excused because their conduct would not have been a violation under a later revision of the rules. *Hanson R. Carter*, 23 FCC 2d 511 (1970). Considering the licensee's petition and all the circumstances in this case, we are not persuaded to remit or reduce the forfeiture.

5. In view of the foregoing, IT IS ORDERED, that the licensee's Petition for Reconsideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

FCC 74-313

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF SYLVANIA BROADCASTING SYSTEM, INC., LICENSEE OF RADIO STATION WSYL, SYLVANIA, GA.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted March 28, 1974; Released April 4, 1974)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture of $1,000 dated June 6, 1973, addressed to Sylvania Broadcasting System, Inc., licensee of Radio Station WSYL, Sylvania, Georgia and (2) the licensee's response of July 5, 1973 to the Notice of Apparent Liability.

2. Station WSYL is authorized to operate with antenna input power of one kilowatt from 5:15 a.m. to 7:30 p.m. Eastern Standard Time (EST) in June and from 5:30 a.m. to 7:30 p.m. EST in July. During the remainder of its unlimited hours the station is authorized to operate with antenna input power of 250 watts.

3. The Notice of Apparent Liability for forfeiture indicated that, in violation of Section 73.87 of the Commission's Rules and the terms of the station license, Station WSYL was operated with antenna input power of one kilowatt commencing at 5:00 a.m. EST on June 30, 1972 and on each day from July 10 through 26, 1972 except July 16, 22 and 23.

4. In response to the Notice of Apparent Liability licensee did not deny the violations, but attributed them to a lengthy absence of the owner and general manager due to illness. Licensee stated:

> The reason I have explained this is because I was not at the station when daylight saving time went into effect and the matter of when to go to 1000 watts and cut back to 250 watts would have been left to the employees of the station. I checked the paper which was posted by one of the employees for announcers to follow when going to 1000 watts and cutting back to 250 watts and found that an error was made when writing down the EDT to follow and was incorrectly typed as 5:30 A.M. EDT when it should have been 6:30 A.M. EDT or 5:30 A.M. EST. I have enclosed this piece of paper for your observation. I also talked with one of the announcers while I was in the hospital and suggested that they put it down as, For example, 6:30 A.M. EDT-5:30 A.M. EST. And the reason that I said the output power in this instance was my fault was because I was not here to check and make sure the times were put down correctly and be sure that they were being followed correctly.
>
> I realize that licensees are responsible for the acts of their employees, but because I was ill during this time and could not be here to see after it myself, I ask that we be released of this $1000.00 forfeiture or that it be reduced as much as possible. We may have repeatedly failed to abide by the terms and provisions

of the station authorization in this matter, but it was NOT willful. I realize that based on my written answer in reply to the violation you could not see this, but I do hope that you will take this explanation of the violation into account and let us not have to pay the $1000.00 or at least, as I asked, reduced it as much as you can.

5. Licensee's explanation that the premature power increases resulted from an error on a posted notice listing average local sunrise and sunset times is not persuasive. It does not explain the violation on June 30, 1972 (the posted notice listed correct times for June); nor does it explain why station operators followed neither of the inconsistent times listed for July (power was increased at 5:00 a.m. EST, rather than 5:30 a.m. EST or 5:30 a.m. EDT as listed). In any event, a licensee will not be excused for such violations because of misunderstanding or mistake. *Evergreen Broadcasting Corp.*, 26 FCC 2d 453 (1970). Here, the violations could easily have been detected if the chief engineer or some other employee had made any effort to inspect the operating logs for the period cited. The licensee is responsible for the operation of the station and cannot avoid that responsibility because of the failure of its employees to perform their duties. *L. L. Hilliard and Ruth K. Hilliard dba Hilliard Co.*, 8 FCC 2d 1057 (1967).

6. We find that the licensee repeatedly operated with daytime facilities during nighttime hours as set forth above in violation of Section 73.87 of the Rules and the terms of the license. Having found the violations to be repeated, we find it unnecessary to make any additional determination as to willfulness. *Paul A. Stewart*, 45 FCC 773 (1963). Operation with daytime facilities during nighttime hours is a serious violation because of the potential for harmful interference to other broadcast stations. *The McLendon Corporation*, 18 FCC 2d 224 (1969). We have considered all the circumstances in this case, and we are not persuaded to remit or reduce the forefeiture.

7. In view of the foregoing, IT IS ORDERED, That Sylvania Broadcasting System, Inc., licensee of Station WSYL, Sylvania, Georgia, FORFEIT to the United States the sum of one thousand dollars ($1,000) for repeated violation of Section 73.87 and failure to observe the terms of the station license. Payment may be made by mailing to the Commission a check or similar instrument payable to the order of the Federal Communications Commission. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of receipt of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

FCC 74-301

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
TV CABLE CO. OF STEPHENSON COUNTY, FREEPORT, ILL.
For Certificate of Compliance
CAC-426
IL 133

MEMORANDUM OPINION AND ORDER

(Adopted March 28, 1974; Released April 4, 1974)

BY THE COMMISSION: CHAIRMAN WILEY ABSTAINING FROM VOTING.

1. TV Cable Company of Stephenson County alleges that it operates a cable television system at Freeport, Illinois, a community located in the Rockford-Freeport, Illinois, major television market (#97), offering the following television signals:

WREX-TV (ABC, Channel 13), Rockford, Illinois.
WTVO (NBC, Channel 17) Rockford, Illinois.
WCEE-TV (CBS, Channel 23) Freeport, Illinois.
WHA-TV (Educ., Channel 21) Madison, Wisconsin.
WKOW-TV (ABC, Channel 27) Madison, Wisconsin.
WISC-TV (CBS, Channel 3) Madison, Wisconsin.
WMTV (NBC, Channel 15) Madison, Wisconsin.

In its application, TV Cable seeks to add the following signals:

WTTW (Educ., Channel 11) Chicago, Illinois.
WGN-TV (Ind., Channel 9) Chicago, Illinois.
WFLD-TV (Ind., Channel 32) Chicago, Illinois.

Carriage of the Chicago stations is consistent with Section 76.63(a) of the Commission's Rules. Furthermore, TV Cable has assured the Commission that it will comply with the access requirements of Section 76.251. The applicant claims that the stations presently carried on its facilities are grandfathered pursuant to Section 76.65 of the Commission's Rules. TV Cable's application is opposed by Gilmore Broadcasting Corporation, licensee of Station WREX-TV, Rockford, Illinois, and TV Cable has replied.

2. In its opposition, Gilmore Broadcasting asserts that carriage of Stations WKOW-TV and WMTV are not grandfathered on TV Cable's facilities pursuant to Section 76.65 of the Commission's Rules because TV Cable did not operate a "cable television system" as defined by our Rules prior to March 31, 1972. Section 76.5(a) of our Rules defines a "cable television system" as:

> any facility that, in whole or in part, receives directly, or indirectly over the air, and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television or radio stations and distributes such signals by wire or cable to subscribing members of the public *who pay for such service* .... (emphasis added)

In its application, TV Cable has stated the following: (a) TV Cable's predecessor was granted a franchise to operate a cable television system at Freeport, Illinois, on November 2, 1965; (b) In *CATV of Rockford, Inc., et al.*, FCC 67-248, 7 FCC 2d 219 (1967), the Commission authorized carriage of distant Stations WHA-TV, Madison, Wisconsin, and WTTW, Chicago, Illinois, as well as all local stations,[1] on TV Cable's proposed system at Freeport; (c) In order to become operational prior to March 31, 1972, "so that it might legitimately avail itself of the several exemptions provided for such systems," TV Cable purchased a local master antenna system operating within Lincoln Moblie Home Park, a trailer park located at Freeport, Illinois; (d) TV Cable made certain improvements to the facilities which it had purchased and on March 30, 1972, commenced service to 65 "subscribers" living within the trailer park; (e) In order to qualify as an operating cable system with paying subscribers, TV Cable's "subscribers" were provided by TV Cable "with the consideration, which was in turn provided to the cable operator"; (f) Several hours after TV Cable commenced operations on March 30, 1972, it added to its facilities the signal of Station WKOW-TV, which was a local signal on that date.

3. The pleadings indicate that TV Cable embarked on a course of action which it reasonably believed would secure for it the status of a bona fide "cable television system" within the meaning of Section 76.5(a) of the Commission's Rules, including grandfather rights with respect to all signals whose carriage it commenced in Freeport on March 30, 1972.[2] As in *Meredith-Avco, Inc.*, 7 FCC 2d 601 (1967), the special circumstances of this case justify our treating TV Cable as having commenced cable operations on March 30, 1972, and, hence, as grandfathered, in order to permit continuity of service to subscribers.[3]

4. With respect to Gilmore Broadcasting's assertion that TV Cable is not authorized to carry Stations WKOW-TV and WMTV, Madison, Wisconsin, we specifically authorized carriage of WMTV in *CATV of Rockford, Inc., et al., supra.* Since we are treating TV Cable as a bona fide cable television system as of March 30, 1972, and since the signal of WKOW-TV was added to TV Cable's facilities on that date, but somewhat after it commenced service with its previously authorized signals, the signal of WKOW-TV is also grandfathered pursuant to Section 76.65 of the Rules.[4]

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[1] At that point in time, WKOW-TV did not provide predicted Grade B service to Freeport, and accordingly was not a local station. On April 18, 1967, WKOW-TV was granted Commission authorization to modify its facilities, resulting in the station placing a predicted Grade B contour over Freeport. Under the present cable television rules, WKOW-TV is not a local signal in Freeport because Freeport does not lie within the 35-mile zone of Madison.

[2] Since March 30, 1972, TV Cable has constructed 104.8 miles of its system at a cost of $875,109. It presently has 1,915 paying subscribers and is providing them with extensive public access services in addition to the signal carriage described above.

[3] However, our action herein should not be construed as an endorsement of the manner in which TV Cable secured "paid" subscribers prior to March 31, 1972, nor does it abrogate that part of Section 76.5(a) which makes paying subscribers a necessary element of the definition of a cable television system.

[4] Since WKOW-TV was a local signal when it was added to TV Cable's existing facilities (see footnote 1, *supra*), the notification requirements of former Section 74.1105 and the hearing requirement of former Section 74.1107 were not applicable.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the objection filed by Gilmore Broadcasting Corporation, licensee of Station WREX–TV, Rockford, Illinois, IS DENIED.

IT IS FURTHER ORDERED, That the application for certificate of compliance (CAC–426) filed by TV Cable Company of Stephenson County IS GRANTED, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-309

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF THE COMMISSION'S RULES AND REGULATIONS TO EFFECTUATE THE UNITED STATES-MEXICO FM BROADCASTING AGREEMENT

ORDER

(Adopted March 28, 1974; Released April 3, 1974)

BY THE COMMISSION:

1. The United States-Mexico FM Broadcasting Agreement, which went into force and effect August 9, 1973, concerns the allotment and the use of FM broadcast channels within 199 miles (320 kilometers) of the common border between the United Mexican States and the United States. By Order, adopted October 3, 1973, and effective October 17, 1973 (43 F.C.C. 2d 293), the FM Table of Assignments—§ 73.202(b) of the Commission's Rules and Regulations—was amended for Arizona, California, New Mexico, and Texas to reflect the channel allotments agreed to for the border area, and § 73.507 was added to list the Class A, B, and C noncommercial educational FM Channel (201–220) allotments for the border area within these four states.

2. We are now promulgating amendments to the Commission's Rules and Regulations to further implement the Agreement.[1] These amendments relate to practice and procedure, or are interpretative in nature. In the circumstances, compliance with Section 4 of the Administrative Procedure Act is excepted (see 5 U.S.C. 553(b)(3)(A)).

3. Accordingly, IT IS ORDERED, That, pursuant to the authority of §§ 4(i) and 303(r) of the Communications Act of 1934, as amended, §§ 1.573, 73.204, 73.207, 73.504, and 74.1202 are amended as set forth in the attached Appendix. These amendments are effective April 12, 1974.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

APPENDIX

1. In § 1.573, Note 1 is amended to read as follows:

* * * * * * *

"NOTE 1.—*Noncommercial educational stations.*—Pending further consideration of issues in Docket No. 14185 (dealing with the revision of the FM Broadcast Rules and Regulations), an application for a noncommercial educational FM broadcast authorization will be subject to the following, notwithstanding any other provision of the FM Broadcast Rules or this section:

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[1] See "Interim Policy", 43 F.C.C. 2d 1237 (1973).

"1. *Restrictions.*—With respect to acceptance of an application for a construction permit for a new or changed facility on channels reserved in § 73.501 of this chapter for noncommercial educational use, the following restrictions will apply: "(a) *Channels 218, 219, and 220.*—For Channels 218, 219, and 220, the following criteria must be met:

"(i) Power and height may not exceed the maximum specified in § 73.211 of this chapter for a Class B or C commercial station depending on the zone in which it is proposed to locate the facility.

"(ii) Minimum mileage separations to stations or assignments on Channels 221, 222, or 223, specified in the FM Table of Assignments (§ 73.202(b) of this chapter) must comply with §§ 73.207 and 73.504 of this chapter.

"(iii) If the application is for a change in transmitter site, separation between the facility and either a co-channel or adjacent channel station may not be shortened if the result would be a spacing less than that required by § 73.207 of this chapter.

"(b) *Objectionable interference.*—No application for a facility on any channel specified in § 73.501 of this chapter will be accepted if the requested facility either would cause objectionable interference within the 1 mV/m contour of any co-channel or adjacent channel, or receive interference within the proposed 1 mV/m contour. The following standards shall be used to determine the existence of objectionable interference:

"(i) The distance to the 1 mV/m contour shall be determined by the use of Figure 1 of § 73.333 (F(50,50) curve) of this chapter (see § 73.313(c)(1)).

"(ii) The distance to the applicable interference contour shall be determined by the F(50,10) curve, dated June 20, 1960, and published with the Commission's Order, FCC 61–1447, adopted December 6, 1961, setting forth the interim procedure for processing FM applications.

"(iii) Objectionable interference will be considered to exist if, on the basis of the curves referred to in this subparagraph, the ratio of undesired to desired signal exceeds: 1:10 for co-channel; 1:2 for first adjacent channel (200 kHz removed); 10:1 for second adjacent channel (400 kHz removed); and 100:1 for third adjacent channel (600 kHz removed).

"(c) *Directional antenna.*—No application for a construction permit of a new station, or change in channel, or change in an existing facility on the same channel will be accepted for filing if a directional antenna with a maximum-to-minimum ratio of more than 15 dB is proposed.

"2. *Maximum and minimum facilities for stations on noncommercial educational FM channels.*—No provision as to a minimum facility for an FM broadcast station shall apply to a noncommercial educational station operating on a channel specified in § 73.501 of this chapter; and no provision as to a maximum facility shall apply to a noncommercial educational station on Channels 201 to 217, inclusive. However, any application specifying a facility either below the minimum or exceeding the maximum set forth in § 73.211 will not be necessarily granted; see Notice of Inquiry in Docket No. 14185 as concerns educational FM matters (5 F.C.C. 2d 587, 588, fn. 2 (1966)); see also 13 F.C.C. 2d 751 (1968) and 17 F.C.C. 2d 496 (1969)).

"3. *Additional requirements for noncommercial educational stations under the United States-Mexico FM Broadcasting Agreement.*—For the area within 199 miles of the common border between the United Mexican States and the United States, one may only apply for Class A, B, and C channels listed in § 73.507 of this chapter. An application for a noncommercial educational channel will not be accepted if there is a failure to meet the minimum mileage separations to Mexican assignments or authorizations set forth in the Note to § 73.207 of this chapter.

* * * * * * *

2. In § 73.204, paragraph (a) is amended to read as follows:

"§ 73.204 INTERNATIONAL AGREEMENTS AND OTHER RESTRICTIONS ON USE OF CHANNELS.

"(a) The United States has entered into agreements with Canada and the United Mexican States, respectively, dealing with the allotment and use of FM broadcast channels and facilities for a defined border area. Assignment of an FM channel, authorization for use of an FM broadcast facility, and related matters as to the use of FM facilities for the particular border area are subject to the provisions of the respective agreements. Both provide for consultation and the right to object to any particular proposal. The Commission will give notice of the filing of such an objection; if, for whatever reason, the Commission has taken action inconsistent with any such timely objection, it may take appropriate steps to rescind the action taken."

3. In § 73.207(a) the following is added to the note to read as follows:

"§ 73.207 MINIMUM MILEAGE SEPARATIONS BETWEEN CO-CHANNEL AND ADJACENT CHANNEL STATIONS ON COMMERCIAL CHANNELS.

"(a) * * *

"NOTE.— * * *

"Under the United States-Mexican FM Broadcasting Agreement, the following additional mileage separations to Mexican channel assignments and authorizations must be adhered to:

Class to class	Cochannel	1st adjacent	2d adjacent	3d adjacent
A to C	130			
A to B	110			
D to C	125	95	65	65
D to B	105	69	40	40
D to A	60	30	15	15
D to D	11	6	3	3

"And for stations or assignments separated in frequency by 10.6 or 10.8 MHz (53 or 54 channels), the following mileage separations must be conformed to:

"Classes of stations:	*Required spacing in miles*
C to D	15
B to D	10
A to D	5
D to D	2"

4. In § 73.504 a Note is added at the end to read as follows:

"§ 73.504 ZONES, CLASSES OF STATIONS, USE OF CHANNELS, FACILITIES, AND MINIMUM MILEAGE SEPARATIONS BETWEEN STATIONS.

* * * * * * *

"NOTE.—Under the United States-Mexican FM Broadcasting Agreement, for stations and assignments separated in frequency by 10.6 or 10.8 MHz (53 or 54 channels), the following mileage separations (see Paragraph (g)) to Mexican allocations or assignments must be adhered to:

"Classes of stations:	*Required spacing in miles*
C to D	15
B to D	10
A to D	5
D to D	2"

5. In § 74.1202, a note is added at the end to read as follows:

"§ 74.1202 FREQUENCY ASSIGNMENT.

* * * * * * *

"NOTE.—A translator must comply with the mileage separations to Mexican FM channel assignments and authorizations as Class D FM stations set forth in the Note to § 73.207 of this chapter."

FCC 74-295

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re applications of
UNITED VIDEO, INC.
For Consent To Assignment of Construction Permits in the Point-to-Point Microwave Radio Service for Stations at Dallas, Tex.; Oklahoma City, Tulsa, Okla.; Kansas City, St. Louis, Mo.; and 32 Intermediate Locations
File No. 2571-C1-AP-(37)-74

MEMORANDUM OPINION AND ORDER

(Adopted March 28, 1974; Released April 3, 1974)

BY THE COMMISSION:

1. The Commission has before it the above captioned application for consent to assignment of 37 construction permits (see Appendix) from United Video, Inc. (UV) to Southern Pacific Communications Company (SPCC). The application, which is unopposed, was filed on January 4, 1974.

2. For a purchase price of approximately $6.6 million, SPCC proposes to acquire UV's data business assets, including microwave facilities authorized for the provision of specialized common carrier service between Dallas, Texas; Oklahoma City, Oklahoma; Tulsa, Oklahoma; Kansas City, Missouri; and St. Louis, Missouri. United Video, a subsidiary of LVO Cable, Inc., wishes to divest itself of its specialized communications common carrier operations, but it will retain its miscellaneous common carrier video systems and its proposed Multipoint Distribution Service systems.[1] Under the agreement SPCC will also acquire all rights to pending UV applications for specialized carrier and network television relay facilities.

3. SPCC, a wholly owned subsidiary of the Southern Pacific Company,[2] is a specialized common carrier which has been authorized a microwave system from Sacramento through southern California and east through Arizona, New Mexico, Texas, Louisiana, Arkansas, and Missouri to East St. Louis, Illinois. The system, like the facilities to be acquired from UV, is to provide essentially a private line transmission service for data, facsimile, control, telemetry, voice and other

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[1] Originally, applications were filed for SPCC to acquire all operations of UV (File No. 2572-C1-TC-(37)-74) and its sister corporation, KHC Microwave Corporation (File No. 2573-C1-TC-(7)-74). However, such applications were subsequently dismissed and the scope of the proposed acquisition narrowed.

[2] The Southern Pacific Company is also the parent of Southern Pacific Transportation Company which operates the railroad.

forms of communication. The acquisition and construction will be financed by Southern Pacific Company and two life insurance companies.

4. Both UV and SPCC have been authorized facilities between Dallas and St. Louis (although via different routes), but construction of the UV facilities is almost complete while SPCC has not yet commenced construction of its facilities along this portion of its route. SPCC indicated that most of the permits for its current Dallas-St. Louis route will be relinquished between St. Louis and Chicago.

5. It appears that this proposed acquisition is consistent with SPCC's plan ultimately to offer coast to coast service. In determining that the public interest would be served by adopting a policy of competitive new entry to serve the specialized markets, we recognized the possibility that a weaker entrant might decide upon a merger with, or sale of facilities to, a stronger competitor. We stated our view that the loss of such a carrier "is not a matter of great moment to the public at large" since the "demand for this type of communications service would undoubtedly be met by another entrant or an established carrier, and the frequencies would revert to the Commission for assignment to others."[3] The elimination of UV as a competitor in this area will not materially affect our policy goal of affording private line users a diversity of choice in satisfying their specialized communications requirements. In addition to SPCC and the established carriers, Datran, MCI and N-Triple-C have specialized carrier facilities under construction or in operation in the general area between Illinois and Texas. Thus, it appears that the acquisition of the UV facilities will enhance SPCC's competitive position without depriving the public of a reasonable range of service options.

6. In view of the foregoing, we find that this proposed assignment will serve the public interest, convenience and necessity, and that SPCC is technically, financially and otherwise qualified to acquire and operate these facilities.

7. Accordingly, IT IS HEREBY ORDERED, That the captioned application IS GRANTED. IT IS FURTHER ORDERED, That SPCC IS AUTHORIZED to acquire and operate the various channel quantities (or equivalent thereof) previously authorized to UV by *Orders* released January 8, 1973 (FCC 73-17) and July 30, 1973 (FCC 73-794).

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[3] *See First Report and Order* in Docket No. 18920, 29 FCC 870, 926 at paragraph 119 (1971).

APPENDIX

United Video, Inc., specialized common carrier authorizations

Call sign	File No.	Location
WPX50	5807-C1-P-70	Tulsa, Okla.
WPX51	2729-C1-P-73 5808-C1-P-70	Sand Springs, Okla.
WPX52	5809-C1-P-70	Shamrock, Okla.
WPX53	5810-C1-P-70	Carney, Okla.
WPX54	5812-C1-P-70 6831-C1-P-73	Woods, Okla.
WPX55	5811-C1-P-70	Oklahoma City, Okla.
WPX56	5813-C1-P-70 6833-C1-MP-73	Byars, Okla.
WPX57	9115-C1-MP-73	Scullin, Okla.
WPX58	9116-C1-MP-73	Mannsville, Okla.
WPX59	9117-C1-MP-73	Thackerville, Okla.
WPX60	5817-C1-P-70	Mountain Springs, Tex.
WPX61	5818-C1-P-70	Lewisville, Tex.
WPX62	5819-C1-P-70	Dallas, Tex.
WOF52	6832-C1-P-73	McKiddyville, Okla.
WQR81	5768-C1-P-70	St. Louis, Mo.
WPF34	2720-C1-P-73	High Ridge, Mo.
WQR82	4852-C1-P-71	Labadie, Mo.
WAD72	4853-C1-P-71	Union, Mo.
WAD73	4854-C1-P-71	Belle, Mo.
KGB96	4855-C1-P-71	Rolla, Mo.
WQR83	4856-C1-P-71	Waynesville, Mo.
WAN79	4857-C1-P-71	Lebanon, Mo.
WCZ32	2726-C1-P-73	Urbana, Mo.
WCZ33	2725-C1-P-73	Warsaw, Mo.
WPF38	2724-C1-P-73	Iola, Mo.
WPF37	2723-C1-P-73	Warrensburg, Mo.
WPF36	2722-C1-P-73	Odessa, Mo.
WQR84	5783-C1-P-70	Raytown, Mo.
WPF35	2721-C1-P-73	Kansas City, Mo.
WAN80	4858-C1-P-71	Marshfield, Mo.
WAN81	4859-C1-P-71	Springfield, Mo.
WAN82	4860-C1-P-71	Phelps, Mo.
WQR85	5790-C1-P-70	Joplin, Mo.
WOE82	2727-C1-P-73	Miami, Okla.
WPF41	2728-C1-P-73	Centralia, Okla.
WQR86	5800-C1-P-70	Nowata, Okla.
WQR87	5801-C1-P-70	Avant, Okla.

FCC 74-305

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of
WCSV, INC. (WCSV), CROSSVILLE, TENN.
Has: 1520 kHz, 250 W, Day
Requests: 1520 kHz, 5 kW (1 kW-CH), Day
For Construction Permit

MEMORANDUM OPINION AND ORDER

(Adopted March 28, 1974; Released April 5, 1974)

BY THE COMMISSION:

1. The Commission has for consideration a petition of WCSV, Inc., for reconsideration of the Commission action of September 19, 1973, denying a request for waiver of the provisions of section 73.37 of the Commission's rules to permit acceptance of the above-captioned and described application. *WCSV, Inc.*, 42 FCC 2d 1008, 28 RR 2d 664.

2. Section 73.37(e)(3)(ii) permits an authorized station to apply for an increase in power when less than 80 percent of the area or population of the community to which the station is assigned is included within its 5 mV/m groundwave contour. Section 73.37(e)(3)(iii) permits a station to apply for a power increase where such increase would result in a standard broadcast service to 25 percent of the area or population not receiving such service. WCSV does not come within either provision because the entire community of Crossville, Tennessee, lies within the WCSV 5 mV/m contour, and all of the area to which WCSV would bring a new service now receives service from other broadcast stations.

3. WCSV's petition is essentially a reargument of the contentions advanced in its original request for waiver. The Commission has held that reconsideration will not be granted merely for the purpose of again debating matters upon which the Commission has deliberated and spoken. *Ralph W. Silkwood et al.*, 42 FCC 2d 820, 28 RR 2d 417 (1973); *WWIZ, Inc.*, 37 FCC 685, 3 RR 2d 316 (1964). The Commission is not persuaded to alter its conclusion by WCSV's rearguments. Therefore, WCSV's petition will be denied. However, certain aspects of WCSV's petition appear to require some comment.

4. In denying the original request for waiver, the Commission observed that studies submitted by WCSV and our own studies indicate that the present operation of WCSV provides service in accordance with out rules to all the corporate limits of Crossville. Stated another way, WCSC's studies and the Commission's studies indicate that the WCSV 5 mV/m contour covers all of the area within the corporate limits (as the term is generally used in the traditional sense) of the

municipality of Crossville. WCSV attempts to expand the meaning of the term "corporate limits" to include an area substantially larger than the area within the corporate limits, in the generally accepted sense, of Crossville. What WCSV insists should be Crossville for allocation purposes is an area under the jurisdiction of the Crossville Regional Planning Commission which is specifically described as the area within the Crossville municipal limits (corporate limits) and within a five-mile radius of those limits.

5. WCSV seizes upon the Commission's recognition that the Crossville Regional Planning Commission, an agency responsible for the orderly planning for proper land use, performs a function which is governmental in nature and concludes that Crossville has two governments which are related. However, it seems clear that the Planning Commission has not replaced the Crossville municipal government and therefore does not perform the function of a municipal government. In a logical extension of WCSV's contention, it is apparent that Crossville has a third government in the county administration of Cumberland County. The fact remains that the major portion of the Regional Planning Commission's jurisdiction lies outside the municipality of Crossville.

6. WCSV argues that, in the absence of the Regional Planning Commission, Crossville would have annexed adjacent areas, but this contention appears to be speculative at best.

7. Petitioner persists in describing the circumstances in Crossville and environs as "unique," but the Commission has stated, in denying WCSV's request for waiver that it is common knowledge that population patterns in Cumberland County near Crossville are not materially different from population patterns in a great many areas of this nation.

8. WCSV expresses the belief that a grant of the requested waiver would set no precedent for other stations to request increased power. The Commission disagrees. A waiver in this instance would engraft on section 73.37(e)(3)(ii) an exception permitting a power increase for existing stations upon a showing of population concentration outside the station's city of license. In adopting section 73.37(e)(3)(ii), the Commission did not envisage relaxation of the rule in the manner urged by WCSV.

9. Petitioner cites *Rockland Broadcasting Co.*, 36 FCC 303, 2 RR 2d 39 (1964), affirmed *sub nom. Dacre et al.* v. *Federal Communications Commission*, 122 U.S. App. D.C. 171, 352 F. 2d 647, 5 RR 2d 2070 (1965), for the proposition that the Commission has defined "community" by a test of determining what areas should logically be associated together as opposed to what areas more logically identified with different localities. However, in Rockland, the Commission's Review Board simply found that certain factors established that an unincorporated area constitutes a community within the meaning of section 73.30(a) of the Commission's rules.[1] No question of a power increase of an existing station was involved.

10. Finally, petitioner argues that, because two stations that compete with WCSV, WEAW(AM) and WEAW-FM, serve larger areas

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[1] Section 73.30(a) provides that each standard broadcast station will be licensed to serve primarily a particular city, town, political subdivision or community.

than does WCSV, the Commission should waive its rules to provide a fair, efficient and equitable distribution of radio service pursuant to section 307(b) of the Communications Act of 1934, as amended. The Commission does not construe that section of the act as requiring a waiver of a basic allocation standard.

11. Accordingly, the petition for reconsideration by WCSV, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

FCC 74-333

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Application of WESTERN UNION TELEGRAPH CO. For Authority to Launch and Operate a Domestic Communications Satellite	File No. 1-DSS-L-74

MEMORANDUM OPINION, ORDER, AND AUTHORIZATION

(Adopted April 3, 1974; Released April 5, 1974)

BY THE COMMISSION:

1. On January 11, 1974 Western Union Telegraph Company (Western Union) requested authority to launch the first of its WESTAR (HS333A) satellites on or about April 11, 1974, place it on station at 99° west longitude approximately two weeks later, and operate such satellite. Western Union states that satellite construction has taken place in accordance with the specifications and parameters set forth in the Attachment to the Commission's January 18, 1973 Order and Authorization granting the construction permit (38 FCC 2d 1197). As an adjunct to launch authority, Western Union requests temporary authority to operate the facilities covered by Attachment A to its application, including the Satellite Control and TT&C facilities at its Glenwood, New Jersey earth station (File No. 1-DSE-P-71).

2. On February 19, 1974 GTE Satellite Corporation (GSAT) filed a motion for deferral of action on Western Union's request for the assignment of orbital location 99° W. longitude until the Commission adresses the question of orbit spacing and orbital assignments for other systems. It points out that National Satellite Services, Inc. (NSS) has requested the location 99° W. longitude, which is one of the limited number capable of serving Hawaii/Alaska as well as the 48 states. Moreover, the carrier authorized for message telephone service to Hawaii is GSAT; and to Alaska the authorized carrier is RCA Alaska Communications, Inc. (RCA Alascom).

3. In a response to GSAT dated March 12, 1974, American Satellite Corporation (ASC) asserts that GSAT should not be permitted to utilize the occasion of assigning orbital locations to Western Union to obtain the position of a favored carrier for itself in Hawaii and for RCA Alascom in Alaska. Western Union's opposition to GSAT, filed on March 12, 1974, claims that GSAT is without legal right to challenge the 99° assignment because it is not a satellite grantee, that this assignment would still leave a sufficient number of suitable orbital locations available for assignment to grantees authorized to provide MTT service to Alaska and Hawaii, that the Commission has retained the right to direct a grantee to chance an orbital location and could

do so in the case of Western Union if required in the public interest, and that the assignment of 99° to Western Union promises substantial benefits to Hawaii and Alaska in the form of lower rates for interstate service.

4. On March 22, 1974 RCA Alaska Communications, Inc. (RCA Alascom) filed a petition for partial denial, opposing Western Union's request for 99° west longitude insofar as it is premised on proposed service to Alaska. Claiming that the Western Union satellite proposal is not properly designed for service to Alaska, even if the satellite were positioned at 99° west longitude, RCA Alascom states that it does not plan to use Western Union's system on a carrier's carrier basis pending activation of the RCA system and will oppose Western Union's Section 214 application to provide competitive services in Alaska. RCA Alascom asserts that the policies adopted in Docket No. 16495 preclude the assignment of 99° to Western Union, even temporarily, and that Western Union should not be authorized to operate from any orbital position west of 94° west longitude.[1]

5. Although the RCA petition is untimely, it is partly responsive to new material first raised in Western Union's opposition to GSAT and will be considered in the interest of a full record. Contrary to Western Union's assertion, we believe that GSAT has sufficient interest in the assignment of orbital locations to have its views considered. While GSAT is not a satellite grantee, it has been granted Section 214 authority to lease substantial transponder capacity in the satellites of National Satellite Services, Inc. (NSS) and, having been authorized to serve Hawaii, has an interest in the orbital locations capable of serving that point. However, we are not persuaded that the public interest would be served by delaying the assignment of an orbital arc location to Western Union until assignments are made to other domestic satellite systems. We have repeatedly stated our view that the public interest would be served by an early demonstration of the potential benefits of commercial domestic satellite service. Western Union has proceeded expeditiously pursuant to Commission authorizations, and has made arrangements with the National Aeronautics and Space Administration for a launch on or about April 11, 1974. We cannot authorize the launch without assigning at least a temporary orbital location.

6. The matter of orbital arc locations was treated in Docket No. 16495. The staff recommendation noted that while many of the orbital locations proposed by the then pending applicants conflicted with each other, it would be possible to accommodate all in the available orbital spacing by reducing separations to about 3° and shifting some satellites from orbital locations that can serve Alaska, Hawaii and the 48 states (CONUS) to more easterly locations that can serve only CONUS and eastern off-shore points (34 FCC 2d 1, 29). The *Second Report and Order* (35 FCC 2d 844, 859) adopted paragraph 152 (a) of the staff recommendation, which states (34 FCC 2d at 72):

> The assignment of orbital arc locations will be made by subsequent order of the Commission. We will assign orbital locations for satellites authorized to serve Alaska and Hawaii in that portion of the orbital arc that is five degrees

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[1] On April 1, 1974 Western Union submitted an opposition to the RCA petition.

> or more west of the orbital locations that have been selected by Canada and is capable of illuminating those States as well as CONUS. Other authorized satellites will be assigned orbital locations in that portion of the orbital arc that is five degrees or more east of the Canadian locations and is capable of illuminating CONUS. The orbital locations for satellites authorized to utilize 4 and 6 GHz frequencies, in whole or in part, will be separated by no more than 3° (or allow for intervening assignments separated by 3°) unless good cause is shown for a wider separation. In assigning orbital arc locations, the Commission would endeavor to make maximum allowance for the authorization of future satellites utilizing 4 and 6 GHz frequencies. The assignment of any orbital location for use by a particular satellite shall not grant the licensee any right to the use of that orbital location for another satellite. Nor shall the initial assignments preclude the Commission from changing orbital location assignments during the life of the initially authorized satellites, as required by the public interest, convenience or necessity. [Footnotes omitted.]

7. The Commission's *Memorandum Opinion and Order* on reconsideration expanded on the question of service to Alaska and Hawaii and the assignment of orbital arc locations. We stated that our policy of affording other carriers now providing non-MTT services to Hawaii and Alaska appropriate access to the domestic satellite system authorized to provide MTT does "not preclude authorization of independent domestic satellite facilities to provide specialized interstate services to these points" (*Memorandum Opinion and Order* of December 21, 1972, 38 FCC 2d 665, 696). We further stated (*id.*):

> We do not regard this policy as unduly prejudicial to RCA Alascom, since no duplicate facilities will be authorized for the provision of the interstate business and revenues that concededly constitutes its "life blood." Furthermore, such applicants will be required to show with specificity how a grant of their applications will serve the public interest and how they will provide tangible benefits in the form of new and better service, lower rates, etc. We will also consider the impact of a grant on the ability of RCA Alascom to discharge its responsibility to Alaska.

We also recognized that it is "not practicable, however, to authorize all of the pending system applicants to serve Alaska, Hawaii and Puerto Rico or to adopt a licensing standard that makes the desire of a qualified applicant to serve one or more of these points the sole controlling consideration" (38 FCC 2d at 697). After noting that the systems authorized to provide MTT service to Alaska, Hawaii and Puerto Rico would not use all of the limited number of orbital locations capable of viewing all 50 states, we said that we would "not authorize use of the remaining locations for 4 and 6 GHz operations, in whole or in part, unless in addition to meeting the standard set forth above the applicant shows that it will provide an additional service which should be made available to all 50 states on the same system (e.g., interstate television program transmission) or that it will provide some service on terms and conditions of special benefit to the States of Alaska and/or Hawaii" (*id.*).

8. With respect to Western Union's proposal to serve Hawaii and Alaska, the Commission said that it would withhold processing of Western Union's application to construct an earth station in Hawaii pending a determination of the unresolved question as to whether and to what extent Western Union is barred by Section 222 of the Communications Act from furnishing Hawaii/Mainland services. In this connection, the Commission stated (38 FCC 2d at 607–698):

We stress, however, that our assessment of an application by Western Union or any other applicant for an earth station in either Hawaii or Alaska must take account of the limited market in those States for non-MTT services and the effects thereof on the economic viability of satellite service, particularly in view of the relatively limited markets and the requirements we are imposing with respect to the integration of rates and charges for MTT service into the MTT rate schedule applicable within the contiguous states.

9. Thus, under the policies adopted in Docket No. 16495, an applicant's request for a particular orbital location is not dispositive of what orbital location will be assigned and conflicting requests by different applicants do not necessarily give rise to comparative hearing rights. We undertook to accommodate all of the pending system applicants by assigning orbital locations in accordance with specified criteria, and retained flexibility to shift initial assignments during the life of the satellites. We reserved the more westerly locations capable of viewing all 50 states for satellites authorized to provide MTT service to Alaska and Hawaii and for such additional systems as might be authorized to serve Alaska and/or Hawaii upon specific showing of special benefit to the state and after consideration of the effect on the MTT carrier.

10. We have already authorized GSAT to serve Hawaii and RCA Alascom to serve Alaska. As ASC points out, these authorizations do not necessarily confer exclusively since the policies adopted in Docket No. 16495 contemplate the authorization of additional facilities to provide non-MTT services upon the requisite showings. In this connection it bears noting that in Docket No. 16495 we assumed orbital separations of 3° between domestic satellites and 5° separations from Canadian satellites. Since that time various applicants have made changes in technical parameters which may require wider separations between domestic satellites to obtain the quality of service desired. While the number of orbital locations available for serving all 50 states is correspondingly smaller, accommodation of the needs of GSAT and RCA Alascom still will not require all of such locations. Moreover, ASC has decided to lease satellite capacity initially, rather than pursuing its pending applications for satellites.

11. Western Union is not presently authorized to serve Alaska or Hawaii. While it has an application pending for an earth station in Hawaii (File No. 71-DSE-P-71), we have previously indicated that processing of that application is being withheld pending a determination of the question of whether and to what extent Western Union is barred by Section 222 of the Communications Act from furnishing service between Hawaii and the Mainland. Moreover, Western Union has not yet amended that application to make the special showing required by paragraphs 75 and 78 of the Memorandum Opinion and Order in Docket No. 16495 (38 FCC 2d at 696, 697–698). We recently rejected a proposal by Western Union to operate as a carrier's carrier for Hawaii/Mainland traffic pending activation of the system authorized to GSAT, without prejudice to a possible change-over to Western Union facilities after the carriers' present arrangement with Comsat expires on December 31, 1974. AT&T *et al.*, FCC 74–150 (February 13, 1974). This action was premised in part of the factor that Western Union "has not yet been authorized to serve Hawaii, and we are not prepared at this juncture to make the policy determination that it

should be" (FCC 74-150, at paragraph 12). While Western Union applied on March 19, 1974 for Section 214 authority to serve Alaska as a carrier's carrier, the time for public comment on this application has not yet expired. We note that RCA Alascom, which is presently authorized to provide domestic satellite service to Alaska via satellites of Telesat Canada, has not sought Section 214 authority to lease satellite capacity from Western Union or filed any other statement indicating its desire to do so. Indeed, in its pleading filed on March 22, 1974, RCA Alascom disclaimed any intent to use the Western Union system and stated that it will oppose Western Union's proposal to serve Alaska. Further, Domestic Satellite Corporation has tendered an application for authority to provide Hawaii/Mainland service via Western Union satellites.

12. Although Western Union is not presently authorized to serve Alaska or Hawaii, we will assign 99° west longitude temporarily subject to the conditions set forth below. We consider this a reasonable and appropriate course in the circumstances, in view of the several unresolved applications or proposals for Alaska or Hawaii service via Western Union satellites, the immediacy of the need to make some orbital location assignment to Western Union prior to launch, our express reservation of authority in Docket No. 16495 to order subsequent changes in orbital locations, and the circumstance that this temporary assignment will not in any event preclude suitable assignments to the RCA and NSS/GSAT systems from unoccupied locations. This action does not authorize Western Union to provide any service to Alaska or Hawaii, or constitute any determination on the merits of pending or future applications for such authority, or in any manner prejudge the Commission's disposition of such applications or the question of separations between satellites. This action is upon condition that the Commission may summarily order a change of orbital locations upon 30 days notice. Among other things, some change may be necessary when coordination with Canada has been completed.

13. Accordingly, IT IS HEREBY ORDERED, That the above-captioned application IS GRANTED to the extent reflected herein and Western Union IS AUTHORIZED to launch its first satellite (KS20) on or about April 11, 1974, to place it temporarily on station at 99° west longitude, and to operate such satellite.

14. IT IS FURTHER ORDERED, That the assignment of orbital location 99° west longitude is subject to change by summary order of the Commission upon 30 days notice and does not confer any right to the use of that orbital location for another satellite.

15. IT IS FURTHER ORDERED, That Western Union IS GRANTED TEMPORARY AUTHORITY to operate the facilities covered by Attachment A to the above-captioned application in connection with the launch and positioning of the satellite.

16. IT IS FURTHER ORDERED, That the relief sought in the pleadings filed by GTE Satellite Corporation, American Satellite Corporation and RCA Alaska Communications, Inc., IS GRANTED to the extent reflected herein and is otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*